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What is known as the Texas rule of damages in telegraph cases has been repudiated by the Circuit Court of Appeals of the Fifth (Texas) Circuit. For many years the Texas courts have followed the doctrine that mental anguish, unaccompanied by injury to person or purse, presents a case of actual damage, and may be recovered as such. This rule has also been adopted by the Supreme Courts of Kentucky, Tennessee, Alabama, North Carolina and Indiana, and several text-writers of reputation seem to have adopted it. The general rule that mental anguish and suffering, unattended by injury to the person, resulting from simple actionable negligence, cannot be a sufficient basis for an action for the recovery of damages, has been maintained and supported by an unbroken line of English authorities, by the earlier decisions of the Texas courts and by the uniform decisions of the Federal Courts and of the Supreme Courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts and Illinois, and by the opinions of several text-writers of unquestioned standing. Under the rule established by the Supreme Court of the United States, which permits Federal Courts to treat such questions as uncontrolled by the State Court decisions, the Circuit Court of Appeals of the Fifth (Texas) Circuit, in the case of *Western Union Telegraph Co. v. Wood*, has overthrown the rule established by the State Courts, and followed the rule existing in the State of Texas before the departure took place. They adopt the language of Mr. Justice Cooper of the Supreme Court of Mississippi, in the case of *Telegraph Co. v. Rogers*, 9 South. Rep. 323, who said: "We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized, and commented on by the courts. But in that class of cases, demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone."

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No one but the plaintiff can know whether he really suffered any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things money can neither palliate nor compensate the injury he has sustained. The rapid multiplication of cases of this character in the State of Texas, since the case of *So Relle* indicates to some extent the field of speculative litigation opened up by that decision." The court concluded by holding that upon principle and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message.

The United States Supreme Court has just rendered a valuable decision which bears upon the question of the extent of the admiralty jurisdiction of the United States. The case arose under Sec. 5346, of the Revised Statutes, which provides penalties for assaults committed by persons "upon the high seas or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State, on board any vessel belonging in whole or part to the United States or any citizen thereof." Certain persons, one Rogers and others, were indicted for assault committed on board the steamer *Alaska*, which was owned by citizens of the United States, the steamer being at the time in the Detroit river, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada. The judges of the United States District Court of Michigan, before whom the case first came, were divided upon the question whether they had jurisdiction, and the question was certified to the Supreme Court of the United States, which has now decided that the Federal Court had jurisdiction.

Justice Field, who read the opinion, said that if the law in question could be applicable to offenses committed on vessels in any navigable river, haven, creek, basin or bay connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that congress intended that no remedy should be af

forded for similar offenses committed upon vessels upon the lakes, to which vessel on the river in question in almost all instances were directed, and upon whose waters they were chiefly to be engaged, and that if the term "high seas" applied to the open unenclosed waters of the lakes, the application of the legislation to the case under indictment could not be questioned, for the Detroit river was a water connecting such high seas and all that part which was north of the boundary line between the United States and Canada, was without the jurisdiction of any State of the Union. Referring to the use of the term "high seas" in the legislation by Congress, the court held that Congress must have intended that the provision of the Act of 1825 should extend to vessels on the great lakes the same as to vessels on seas technically so called, for the reason that there were no bodies of water in the United States to any portion of which the term "high seas" was applicable, if not to the open unenclosed waters of the great lakes.

NOTES OF RECENT DECISIONS.

SALE—STOPPAGE IN TRANSIT—DELIVERY.—In *Weber v. Baessler*, 34 Pac. Rep. 261, decided by the Court of Appeals of Colorado, a merchant having become insolvent, and lost possession of his stock of goods by levy, was presented with a bill for freight and delivery charges on goods ordered before his insolvency, by the collector of a city transfer company, to which he had given a general order to transfer goods shipped to him from the depots to his store. He refused to pay the bill, or receive the goods, explaining his reasons, and advising the collector that the goods should be returned to the seller. The company, however, delivered the goods at his old place of business, and accepted payment of the charges from the sheriff in possession, who forthwith levied on them. It was held that the transfer company was not the merchant's agent to take and keep the goods, so that the delivery to it would end the transit, and, on demand, the seller was entitled to the right of stoppage *in transitu*. The court applied the general rule that a vendor has the right to stop goods sold and unpaid for, while they are in intermediate

hands, in case the vendee becomes insolvent before he has acquired the actual possession of them. The origin of the doctrine is involved in some obscurity, and the reasons on which it is based are differently, and not very satisfactorily, stated by different courts; but the right of the vendor to resume possession of goods which have not been paid for, while on their way to the vendee, or still undelivered to him, in case of his insolvency, is thoroughly established. This right must be exercised while the goods are on their passage, and before possession is taken by the vendee; and if they have ceased to be in transit, and have come into the hands of the vendee, or of his agent for custody, the vendor's right of stoppage is defeated. The goods are regarded as in transit until they have passed out of the possession of every intermediate agency, and have been actually delivered to the consignee; and, until the transit has been determined by such actual delivery, the right of the vendor to reclaim the goods is unimpaired. This right is not affected in the slightest degree by any intervening seizure of the goods at the suit of creditors of the vendee. While it exists, it is paramount to any other lien or claim. *Smith v. Goss*, 1 Camp. 282; *Buckley v. Furniss*, 15 Wend. 137; *Hill Sales*, 229; *Morris v. Shryock*, 50 Miss. 590.

NEGOTIABLE INSTRUMENT — NOTICE OF EQUITIES—INDIVIDUAL LIABILITY.—The Court of Appeals of New York decide in the case of *Casco Nat. Bank v. Clark*, that the fact that a director in a bank discounting a note is also a director in a corporation, payee of the note, is not sufficient to charge the bank with knowledge of equities between the parties and that a note in form as follows, "We promise to pay, etc., and signed "C., Treas.," and "C., Prest.," and with the words "Ridgewood Ice Company" printed across the end, is the personal and individual obligation of the signers. Gray, J. says:

The appellants Clark and Close appearing as makers upon the note, the one describing himself as "Prest." and the other as "Treas." were made individually defendants. They defended on the ground that they had made the note as officers of the Ridgewood Ice Company, and did not become personally liable thereby for the debt represented. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the

names of individuals, a holder taking *bona fide* and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well settled rule. *Byles, Bills*, §§ 36, 37, 71; *Pentz v. Stanton*, 10 Wend. 271; *Taft v. Brewster*, 9 Johns. 334; *Hills v. Bannister*, 8 Cow. 31; *Moss v. Livingston*, 4 N. Y. 208; *De Witt v. Walton*, 9 N. Y. 571; *Bottomley v. Fisher*, 1 Hurl. & C. 211. It is founded in the general principle that in a contract every material thing must be definitely expressed, and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers.

It was said in *Briggs v. Partridge*, 64 N. Y. 357, 363, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. It may be perfectly true, if there is proof that the holder of negotiable paper was aware, when he received it, of the facts and circumstances connected with its making, and knew that it was intended and delivered as a corporate obligation only, that the persons signing it in this manner could not be held individually liable. Such knowledge might be imputable from the language of the paper, in connection with other circumstances, as in the case of *Mott v. Hicks*, 1 Cow 513, where the note read, "the president and directors promise to pay," and was subscribed by the defendant as "president." The court held that that was sufficient to distinguish the case from *Taft v. Brewster*, *supra*, and made it evident that no personal engagement was entered into or intended. Much stress was placed in that case upon the proof that the plaintiff was intimately acquainted with the transaction out of which arose the giving of the corporate obligation. In the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, referred to by the appellants' counsel, the action was against the defendant to hold it as the indorser of a bill of exchange drawn to the order of "S. B. Stokes, Cas.," and indorsed in the same words. The plaintiff bank was advised, at the time of discounting the bill by the president of the Patchin Bank, that Stokes was its cashier, and that he had been directed to send it in for discount, and Stokes forwarded it in an official way to the plaintiff. It was held that the Patchin Bank was liable, because the agency of the cashier in the matter was communicated to the knowledge of the plaintiff, as well as apparent. Incidentally it was said that the same strictness is not required in the execution of commercial paper as between banks; that is, in other respects, between individuals.

In the absence of competent evidence showing or charging knowledge in the holder of negotiable paper as to the character of the obligation, the established and safe rule must be regarded to be that it is the agreement of its ostensible maker, and not of some other party, neither disclosed by the language nor in the manner of execution. In this case the language

is "we promise to pay," and the signatures by the defendants Clark and Close are perfectly consistent with an assumption by them of the company's debt. The appearance upon the margin of the paper of the printed name "Ridgewood Ice Company" was not a fact carrying any presumption that the note was, or was intended to be, one by that company. It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves; and, apparently in the world, they did so by the language of the note, which the mere use of a blank form of note having upon its margin the name of their company was insufficient to negative.

In order to obviate the effect of the rule we have discussed, the appellants proved that Winslow, a director of the payee company, was also a director in the plaintiff bank at the time when the note was discounted, and it was argued that the knowledge chargeable to him, as director of the former company, was imputable to the plaintiff. But that fact is insufficient to charge the plaintiff with knowledge of the character of the obligation. He in no sense represented or acted for the bank in the transaction, and, whatever his knowledge respecting the note, it will not be imputable to the bank. *Bank v. Norton*, 1 Hill, 572, 578; *Mayor etc. v. Tenth Nat. Bank*, 111 N. Y. 446, 457, 18 N. E. Rep. 618; *Bank v. Payne*, 25 Conn. 444. He was but one of the plaintiff's directors, who could only act as a board. *Bank v. Norton*, *supra*. If he knew the fact that these were not individual, but corporate, notes, we cannot presume that he communicated that knowledge to the board. An officer's knowledge, derived as an individual, and not while acting officially for the bank, cannot operate to the prejudice of the latter. *Bank v. Davis*, 2 Hill, 451. The knowledge with which the bank as his principal would be deemed chargeable, so as to affect it, would be where, as one of the board of directors, and participating in the discount of the paper, he had acted affirmatively or fraudulently with respect to it, as in the case of *Bank v. Davis*, *supra*, by a fraudulent perversion of the bills from the object for which drawn, or as in *Holden v. Bank*, 72 N. Y. 286, where the president of the bank, who represented it in all the transactions, was engaged in a fraudulent scheme of conversion. It was said in the latter case that the knowledge of the president as an individual or as an executor was not imputable to the bank merely because he was the president, but because, when it acted through him as president, in any transaction where that knowledge was material and applicable, it acted through an agent. The rule may be stated, generally, to be that where a director or an officer has knowledge of material facts respecting a proposed transaction, which his relations to it, as representing the bank, have given him, then, as it becomes his official duty to communicate that knowledge to the bank, he will be presumed to have done so, and his knowledge will then be imputed to the bank. But no such duty can be deemed to have existed in this case, where the appellants have made and delivered a promissory note, purporting to be their individual promise. If one of the plaintiff's officers did have knowledge—whether individually or as a director of the Clark & Chaplin Company is not material—that the paper was made and intended as a corporate note, his failure to so state to the bank could not prejudice it. It was in no sense incumbent upon him, assuming that he actually participated in the discount (a fact not shown), to explain that the note was the obligation of the Ridgewood Company, and not of the persons who appeared as its makers. He was under no duty

to these persons to explain their acts, and the law would not imply any. At most it would be merely a case of knowledge, acquired by a director, of facts not material to the transaction of discount by the plaintiff, and which he was under no obligation to communicate.

EVIDENCE—MASTER AND SERVANT—DEFECTIVE MACHINERY.—The Findlay Brewing Co. v. Bauer, decided by the Supreme Court of Ohio, was an action by an employee of the defendant to recover damages for a personal injury caused, as claimed, by the negligence of the defendant in furnishing an unsafe appliance with which to do the work in which he was employed. The averments are, in substance, that while operating, by the direction of the superintendent of the company, a lift, used for the purpose of elevating barrels and similar packages from a lower to an upper floor, he was injured, without fault on his part, by one of these packages falling upon him; and that it resulted from the negligent and defective construction of the appliance, of which the defendant had notice, but of which he had no knowledge, and could not have had, in the exercise of ordinary care on his part. Issues were joined upon the averments of the petition as to the defective character of the lift, the negligence of the defendant, and the averment that it happened without fault on the part of the plaintiff. It appeared that the lift or elevator consisted of a broad, heavy, rubber belt, with certain lateral supports and guides of timber, running nearly perpendicular against a board the full width of the belt, and over a pulley just above the upper floor, and around another just below the wash room floor. To the face of this band were attached two sets of iron hooks, or arms, which, as the band revolved, caught the barrels on the under side and carried them up through an opening in the floor; and as they turned on the upper pulley the barrels fell away by their own weight to the floor above and left the hooks free to continue their downward movement.

It was claimed that these hooks or arms were too short, and that in any irregular motion of the belt, the barrel or package being lifted, would drop out and fall back; and that this was not an infrequent occurrence, when, as sometimes happened, the belt became too loose.

During the progress of the trial a witness was called by the plaintiff, and stated, in an-

swer to a question, that sometime before he had been employed by the defendant to do the same work, and that while so employed, a barrel fell back and injured him. The counsel for the plaintiff stated that this was offered for the sole purpose of showing the dangerous character of the machine, and the defendant's knowledge of that fact, and for no other purpose. The court then stated that it would be received for these purposes, and no other; and so instructed the jury at the time. Similar evidence as to the falling back of barrels while the lift was being operated, was given by other witnesses. Upon appeal here the evidence was held admissible. Minshall, J., says:

The only question in the case is, as to the admissibility of the evidence offered to show that on former occasions, when the elevator was being operated, barrels and packages fell back and injured the persons operating it, as in this case.

It is claimed to be incompetent on the ground that it raises collateral issues, tending to mislead the jury and to surprise the opposite party, by the introduction of evidence for which he could not have been prepared by the nature of the issue. The rule relied on is thus stated by Greenleaf: "The evidence offered must correspond with the allegations, and be confined to the point in issue." Greenleaf on Evidence § 51. And he adds, in the following section, "This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal matter or facts in dispute."

The authorities on the question are conflicting. The Courts of Massachusetts and some of the other States, hold that such evidence is not within the issue, but collateral to it, and should be rejected. *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Pelham*, 1 Gray 510; *Phillips v. Town of Willow*, 70 Wis. 6. But reason and the weight of authority are the other way. The rule, as stated by Greenleaf, excludes only those facts, "which are incapable of affording any reasonable presumption or inference as to the principal matter or fact in dispute." So that a fact cannot be said to be collateral to the issue, if, when established, it tends to prove or disprove the principal fact in dispute. In this case a number of principal facts were in dispute; among these were, the defectiveness of the machine, and the defendant's knowledge of that fact, as well as his negligence in the premises. If the evidence objected to, tended to prove either of these facts, there was no error in its admission. There is no rule of evidence which requires that what is offered should be relevant to every issue in the case; it may be relevant to one, and irrelevant to another. No party can, as a rule, prove his case *uno flatu*. He is compelled, in the nature of things, to proceed step by step. And it not infrequently happens, that what is competent for one purpose is not for another. The mixed character of the evidence does not, however, render it wholly incompetent. The evidence in such case is admitted with a direction from the court to the jury as to how it is to be applied, on what issues it is to be considered, and on what, not; as was done in this case.

On reason it seems plain that as to how this lift or elevator behaved on former occasions—that, at other times when being operated by other persons, barrels being lifted, had fallen and injured those operating it, or had simply fallen back, the conditions remaining substantially the same, tended to prove some vice in its construction that rendered its operation dangerous, and that the company knew or should have known the fact. Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety as well as of its usefulness; and the fact, that the carefulness of the party operating the machine may be involved in each instance, may affect the weight of the evidence, but not its admissibility, as such a limitation would exclude the result of every experiment offered in evidence; which would amount to a *reductio ad absurdum*. The defectiveness of the lift, and the company's knowledge of it, would not, however, alone constitute actionable negligence. The character of the machine and the employer's knowledge, being established, it still remains a question of fact, whether under all the circumstances, a case of actionable negligence has been made out. That which caused the danger, may have been irremediable, and it is no violation of duty by an employer to put one in his employ at the operation of a dangerous machine, if the employee is fully informed as to its character, and voluntarily accepts the employment. Whenever force is applied to machinery there is more or less danger to those operating it; so that the duty of the employer toward his employee is not to furnish a perfectly safe machine, but one as safe as can be provided in the exercise of ordinary care and prudence. Whether the employer is negligent in this regard does not depend solely upon the fact that the machine is known by him to be a dangerous appliance, but whether, with such knowledge, he neglected to do what a person of ordinary care could and would have done under such circumstances. It was, however, incumbent on the plaintiff, in making out his case, to show the dangerous character of the machine and the company's knowledge as well as its negligence; and, while the evidence was not competent to prove negligence, it did tend, as we have shown, to prove the other facts, and was, therefore, admissible. As said by the judge delivering the opinion in *Darling v. Westmoreland*, 52 N. H. 403: "The evidence to prove several independent propositions or distinct facts may be of different kinds, and drawn from different sources." If evidence offered be relevant to any issue in the case, it is admissible however incompetent it may be upon other issues. Commenting on the rule that confines the evidence to facts put in issue by the pleadings and excludes collateral issues, *Doe, J.*, in the case just cited, says: "This rule merely requires the evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge." And it was there held, that, on the question whether a pile of lumber was likely to frighten horses, evidence is admissible to show that horses passing it were or were not frightened by it.

In *McCanagher v. Rogers*, 120 N. Y. 526, an action to recover damages for an injury sustained by the plaintiff while working at a machine in the employ of the defendant, a person who had previously been injured while working the machine in the capacity of the plaintiff, was asked, "How did the injury occur to

you," and he answered, "it jumped out of the socket in the same way," the evidence was held to be relevant and competent as bearing upon the question of the condition of the machine. And the court said, that, while the decisions are not in entire harmony on the question, such is the rule recognized in that State. And so in *Morse v. Railway Co.*, 30 Minn. 465, 471, which was an action by an employee of defendant to recover for an injury caused by its negligence in permitting its tracks to be and remain out of order, such evidence was held competent. The court said:

"It is, of course, not competent for the purpose of showing independent acts of negligence, but we think on principle it is clearly admissible when it tends to show the common cause of these accidents is a dangerous or unsafe thing. It would be certainly competent to prove by an expert that, at a time either before or after the accident when the instrument claimed to have caused it was in the same condition as when the accident complained of occurred, he examined and experimented with it, and found it capable of producing like results. Hence there seems no reason for excluding ordinary experience, when confined within the same limits and for the same purpose. These facts are in the nature of experiments to show the actual condition of the instrument. Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the use for which it was designed, would seem to bear directly upon the issue. It is sometimes objected that this presents new and collateral issues of which a defendant has no notice. In a certain sense every item of evidence material to the main issue introduces a new issue; that is, it calls for a reply. In no other sense does it make a new issue; its only importance is that it bears on the main issue, and, if it does, it is competent." We have quoted thus fully from the opinion in this case, because it seems to set forth clearly and fully the reasons for the admission of such evidence, and to answer every objection that can be made.

The reasoning in the Massachusetts cases, cited above, and relied on by the plaintiff in error, has generally been regarded as unsound; and, for this reason, the decisions have not generally been followed as precedents by the courts of the other States. *Osburn v. City of Detroit*, 18 Am. & Eng. Corp. Cases, 231, where it is said referring to the Massachusetts cases, the weight of authority is decidedly the other way; *City of Chicago v. Powers*, 42 Ill. 169, 173; *Moore v. The City of Burlington*, 49 Iowa, 136; *Walker v. Westfield*, 39 Vt. 246, 251; it is here said that, "A fact, that illustrates, as by an experiment the condition of the subject-matter of the issue in controversy, is not collateral to that issue, but is direct evidence bearing upon it." *City of Aurora v. Brown*, 12 Ill. App. 122; *Darling v. Westmoreland*, 52 N. H. 401; here the Massachusetts cases are considered and declared unsound. *Delphi v. Lowery*, 74 Ind. 520, contains an elaborate review of the cases. *Cook v. New Durham*, 20 Am. & Eng. Corp. Cases 591, 386; *Kent v. Town of Lincoln*, 32 Vt. 539; *Piggott v. Railway Company*, 3 C. B. 228.

As the evidence objected to tended to prove that the lift had in it a vice making it dangerous to operate, and that the company had notice of this from its previous behavior, there was no error in admitting the evidence, with a direction to the jury that it was to be confined to these purposes, and could not be considered on the question of the defendant's negligence in the premises.

CRIMINAL LAW—SEDUCTION—MARRIAGE AS A DEFENSE.—The Supreme Court of Indiana decides in *State v. Otis*, 34 N. E. Rep. 954, that a prosecution for seduction is barred by marriage of the female to her seducer, though he agreed to the marriage to escape punishment. Howard, J., says:

In case of seduction under promise of marriage, we think there can be little doubt that the subsequent marriage of the parties is a bar to further prosecution for the crime committed. The keeping of the promise of marriage is a partial reparation for the wrong done, —the only reparation in any degree adequate to the injury. The chief object to be attained by our criminal statutes is the betterment of the condition of society, and the reform, rather than the punishment, of the criminal. Section 18 of article 1 of the constitution of the State provides that "the Penal Code shall be founded on the principles of reformation, and not of vindictive justice." If the wronged woman freely enters into the married relation with her seducer, thus restoring in some measure the honor of her own womanhood, and securing also the good name and well-being of her child, it would seem that her act is a condonation of the offense, so far as she is concerned, and that the policy of the law would be better served by such marriage than by any punishment that might be meted out to the offender. The question does not appear to have arisen heretofore in this State. Our decisions are nearly silent upon the subject. *Dowling v. Crapo*, 65 Ind. 209 was an action for seduction, where the prosecuting witness afterwards married a person other than the seducer, and it was contended that such marriage barred her action. The court said: "We can conceive of no good reason why an action for the seduction of an unmarried female should be barred by her subsequent marriage. Such subsequent marriage does not remove the stigma or compensate the injury caused by the seduction, nor is there any principle of public policy which requires that a subsequent marriage should bar the action. Public policy encourages, rather than discourages, marriage. Of course, we intimate no opinion as to the effect of a subsequent marriage to the seducer." In *bastardy*, the marriage of the parties seems to be considered as terminating all further legal proceedings. In the case of *Noble v. State*, 39 Ind. 352, the relatrix in a *bastardy* suit appeared in court, and acknowledged that satisfactory provision had been made for the support of her child, and the suit was dismissed. It appeared that the consideration for this dismissal was a promise of marriage on the part of the defendant. The court held this consideration sufficient, saying: "We cannot say that it was not such a provision as is contemplated by the statute." The question before us has, however, been expressly considered in a Michigan case—*People v. Gould*, 70 Mich. 240, 38 N. W. Rep. 232,—and also in a Pennsylvania case,—*Com. v. Elchar*, 4 Pa. Law J. R. 551. Both hold subsequent marriage of the parties a bar to further prosecution for the offense. In the latter case the court says: "It is the seduction under promise of marriage which is an offense of so grievous a nature as to require this exemplary punishment. What promise? One that is kept and performed? Certainly not; but a false promise, broken and violated after performing its fiendish purposes. The evil which led to the enactment was not that females were seduced, and then made the wives of the seducers, but that

after the ends of the seducer were accomplished his victim was abandoned to her disgrace. An objection to this construction is that it places within the power of the seducer a means of escaping the penalty. So be it. This is far better than by a contrary construction to remove the inducement to a faithful adherence to the promise which obtained the consent." See, also, 2 Whart. Crim. Law, § 1760; 5 Lawson, Def. Crime, § 620; 2 Archb. Crim. Pl. & Pr., Pomeroy's notes p. 1825. Were this an action for damages by a parent for the seduction of a daughter under 21 years of age, there is no question that the fact that the daughter had condoned the wrong done herself, or that she had been compensated by the payment of money, or by marriage, could not be pleaded in bar. The damage and loss to the parent are quite independent of the wrong to the daughter. *Gimbel v. Smidth*, 7 Ind. 627; *Pruitt v. Cox*, 21 Ind. 15; *Bartlett v. Krockel*, 88 Ind. 425; *Elchar v. Kistler*, 14 Pa. St. 282; *Sellars v. Kinder*, 1 Head, 134. In the case before us, however, the prosecuting witness, of her free will, so far as the record discloses, and to protect her honor and that of her child, entered into the marriage relation with her seducer. It is not the policy of the law to discourage such means of atonement for the wrong which she has suffered. This marriage, with all its sad attendant circumstances, was to her a refuge from the shame into which she had fallen. It is true that in this case the appellee may have agreed to the marriage in order to escape merited punishment, but we should not for that reason remove an inducement which may lead another wrongdoer to atone for his fault by making the injured party an honored wife and mother. We think the rulings of the court were based upon a proper construction of the statute.

FRUCTUS INDUSTRIALES AND NATURALES.

1. Fructus Industriales.
2. Products of a Mixed Nature—Hops.
3. Fructus Naturales.
4. Same—Growing Trees.
5. Same—Overhanging Trees.
6. Same—"Live Trees."
7. Same—Cut Trees.

1. *Fructus Industriales*.—A distinction is to be observed between *fructus naturales*, or the natural growth of the soil, such as trees, grasses, herbs, fruit on trees, and the like, which at common law are part of the soil, and *fructus industriales*, or fruits or products the result of the annual labor of man in sowing and reaping, planting and gathering,¹ which, though strictly a part of the realty as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes.² Crops, when planted by

¹ *Brittain v. McKay*, 1 Ired. (N. C.) L. 265, 35 Am. Dec. 738; *Flynt v. Conrod*, 1 Phil. (N. C.) L. 192.

² See *Preston v. Ryan*, 45 Mich. 147, 7 N. W. Rep. 819; *Brittain v. McKay*, 1 Ired. (N. C.) L. 265, 35 Am. Dec. 738.

the owner of the soil, constitute, in general, part of the realty, and will pass to the vendee by a conveyance of the land; but the owner of the soil may sell a crop to be cut without conveying any interest in the land, and the purchaser will acquire title to it as a chattel, even though not fit for harvest at the time of the sale.³ Such crops planted by the owner of the soil, if mature and to be gathered immediately, may not only be sold by him, but they may be taken on execution,⁴ as personal property,⁵ where they can be readily severed, like wheat or corn, or dug like potatoes or turnips, or pulled like beets or onions,⁶ be-

³ *Harris v. Frink*, 49 N. Y. 24, 27, 10 Am. Rep. 318, 320. See *Austin v. Sawyer*, 9 Cow. (N. Y.) 39, 42, 43; *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 206; *Newcomb v. Ramer*, 2 John. (N. Y.), 421, note a; *Jones v. Flint*, 10 Ad. & E. 753, 39 Eng. C. L. 396; *Evans v. Roberts*, 5 Barn. & C. 829, 11 Eng. C. L. 700; *Sainsbury v. Matthews*, 4 Mees. & W. 343.

⁴ *McKenzie v. Lampley*, 31 Ala. 526; *Crine v. Tifts*, 65 Ga. 644; *Northwestern v. Stite*, 1 Ind. 113; *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 205; *Parham v. Thompson*, 2 J. J. Marsh. (Ky.) 159; *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391, 41 Am. Dec. 240; *Perkins v. Webster*, 31 La. Ann. 870; *Porche v. Bochin*, 28 La. Ann. 761; *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 312, 22 Am. Dec. 236; *Cheshire Nat. Bank v. Jewett*, 119 Mass. 244; *Heard v. Fairbanks*, 46 Mass. (5 Met.) 111, 38 Am. Dec. 394; *Mulligan v. Newton*, 82 Mass. (16 Gray), 202; *Penhallow v. Dwight*, 7 Mass. 74, 5 Am. Dec. 21; *Preston v. Ryan*, 45 Mich. 174, 7 N. W. Rep. 819; *Gillett v. Truax*, 27 Minn. 528, 8 N. W. Rep. 767; *Bloom v. Welch*, 47 N. J. L. (3 Dutch.) 177; *Westbrook v. Eager*, 16 N. J. L. (1 Harr.) 81; *Shepherd v. Philbrick*, 3 Den. (N. Y.) 172; *Hartwell v. Bissel*, 17 John. (N. Y.) 128; *Stewart v. Doughty*, 9 John. (N. Y.) 108; *Whipple v. Foote*, 2 John. (N. Y.) 418, 3 Am. Dec. 442; *Smith v. Tritt*, 1 Dev. & B. (N. C.) L. 241, 28 Am. Dec. 565; *Cassidy v. Rhodes*, 12 Ohio, 88; *Peacock v. Purvis*, 2 Brod. & B. 362; *Storer v. Hunter*, 3 Barn. & C. 368, 10 Eng. C. L. 172; *Poole's Case*, 1 Salk. 368; *Scorell v. Boxall*, 1 You. & J. 398. Compare *Harris v. Watson*, 22 N. H. 364, 55 Am. Dec. 160.

⁵ *Green v. Armstrong*, 1 Den. (N. Y.) 550, 556. See *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Newcomb v. Reimer*, 2 John. (N. Y.) 421, n.; *Mumford v. Whitney*, 15 Wend. (N. Y.) 387, 30 Am. Dec. 60; *Jones v. Flint*, 10 Ad. & E. 753, 37 Eng. C. L. 397; *Graves v. Weld*, 5 Barn. & Ad. 105, 27 Eng. C. L. 53; *Evans v. Roberts*, 5 Barn. & C. 829, 11 Eng. C. L. 700; *Parker v. Stainland*, 11 East, 362; *Warwick v. Bruce*, 2 Maule & S. 205; *Stainsbury v. Matthews*, 4 Mees. & W. 343; *Carrington v. Roots*, 2 Mees. & W. 248.

⁶ *Dunne v. Ferguson*, 542; *Stainsbury v. Matthews*, 4 Mees. & W. 343; *Warwick v. Bruce*, 2 Maule & S. 205. As to what constitutes a valid levy there is a variety of opinion amongst the decided cases. In *Whipple v. Foote*, 3 John. (N. Y.) 418, 3 Am. Dec. 442, it is said that to make a valid levy of an execution on growing crops, it is not necessary that a manual possession should be taken; that it is sufficient merely to declare that the subject is levied on under execution. In *State v. Poor*, 4 Dev. & B. (N. C.) L. 384, 34 Am. Dec. 387, it is said that a levy upon

cause at common law a growing crop, produced by the expense and labor of the occupier of the land was, as the representative of that labor and expense, considered as an independent chattel,⁷ and the purchaser has a lawful right of entry, egress, and regress, for the purpose of removal.⁸ It has been said that the fact that the crop is immature and growing will not invalidate the sale,⁹ because all

a growing crop is insufficient, unless the officer take open and notorious possession by entering the premises, and publicly announcing the seizure to answer the writ. To the same effect is *Troville v. Tilford*, 6 Watts. (Pa.) 468, 31 Am. Dec. 484. See *Dorrone's Admr. v. Commonwealth*, 13 Pa. St. 164; *Lowry v. Coulter*, 9 Pa. St. 352. In *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707, it is said that to constitute a valid levy, the officer must enter upon the premises where the crops or goods are and take actual possession of them, if it can be done; they must be brought within his view, and made subject to his control; and this doctrine is approved in *Roth v. Wells*, 29 N. Y. 485; *Rodger v. Bonner*, 55 Barb. (N. Y.) 24; *Camp v. Chamberlain*, 5 Den. (N. Y.) 203; *Green v. Burke*, 19 Wend. (N. Y.) 492; *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 124. See *Commonwealth v. Strembocke*, 3 Rawle (Pa.), 341, 24 Am. Dec. 351. It seems that the officer should assert his title, by virtue of the writ, by acts which, were it not for the execution, would make him a trespasser. *Westervelt v. Pinckney*, 14 Wend. (N. Y.) 123, 28 Am. Dec. 516. See *Roth v. Wells*, 29 N. Y. 485; *Camp v. Chamberlain*, 5 Den. (N. Y.) 203; *Green v. Buske*, 19 Wend. (N. Y.) 497; *Beekman v. Lansing*, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707.

⁷ *Graff v. Fitch*, 56 Ill. 373, 11 Am. Rep. 85; *Mattock v. Fry*, 15 Ind. 483; *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 205; *Purner v. Piercy*, 40 Md. 212; *Westbrook v. Eager*, 16 N. J. L. (1 Harr.) 81; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Whipple v. Foot*, 2 John. (N. Y.) 418, 3 Am. Dec. 442; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Mumford v. Whitney*, 15 Wend. (N. Y.) 387, 30 Am. Dec. 60; *Porrier v. Raymond*, 11 Hann. (N. B.) 512; *Jones v. Flint*, 10 Ad. & E. 753, 37 Eng. C. L. 396; *Evans v. Roberts*, 5 Barn. & C. 829, 11 Eng. C. L. 700; *Poulter v. Killingbeck*, 1 Bos. & P. 398; *Parker v. Stainland*, 11 East. 362; *Dunne v. Ferguson*, 542; *Warwick v. Bruce*, 2 Maule & S. 205; *Stainsbury v. Matthews*, 4 Mees. & W. 343. Another line of the English cases deny that crops are personal property, and maintain that they can be transferred as real estate only. See *Falmouth v. Thomas*, 1 Cromp. & M. 89, 3 Tyrw. 963; *Emerson v. Heells*, 2 Taunt. 38.

⁸ *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391, 41 Am. Dec. 240; *Brittain v. McKay*, 1 Ired. (N. C.) L. 265, 35 Am. Dec. 738. See *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 284, 22 Am. Dec. 236; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Stewart v. Doughty*, 9 John. (N. Y.) 108; *Whipple v. Foot*, 2 John. (N. Y.) 418, 3 Am. Dec. 442; *Cheshire Bank v. Jewett*, 119 Mass. 224; *Panhallow v. Dwight*, 7 Mass. 21, 5 Am. Dec. 21; *Bond v. Coke*, 71 N. C. 100; *Walton v. Jordan*, 65 N. C. 172; *Lewis v. McNatt*, 65 N. C. 65; *Smith v. Fritt*, 1 Dev. & B. (N. C.) L. 241, 28 Am. Dec. 565; *Robinson v. Gee*, 4 Ired. (N. C.) L. 191.

⁹ *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 206; *Austin v. Sawyer*, 9 Cow. (N. Y.) 42; *Jones v. Flint*, 10

crops of grain or vegetables, the annual product of human labor and the cultivation of the soil, are personal property and subject to be sold as such before maturity, no matter how long they are to remain in the soil in order to complete their growth.¹⁰ The reason for this is that growing crops being personal property so far as to be capable of severance and sale by oral contract, an agreement for their sale is not an agreement for the sale of an interest in land.¹¹

Ad. & E. 753, 37 Eng. C. L. 396; Carrington v. Roots, 2 Mees. & W. 248; compare Emerson v. Heelis, 2 Taunt. 38.

¹⁰ Davis v. McFarlane, 37 Cal. 634; Marshall v. Ferguson, 23 Cal. 65; Bostock v. Leach, 3 Day (Conn.), 476; Ticknor v. McClelland, 84 Ill. 471; Thompson v. Wilhight, 81 Ill. 365; Graff v. Fitch, 58 Ill. 373, 377, 11 Am. Rep. 85; Bull v. Griswald, 19 Ill. 361; Miller v. State, 39 Ind. 267; Sherry v. Picken, 10 Ind. 375; Bowman v. Conn, 8 Ind. 58; Bricks v. Hughes, 4 Ind. 146; Northern v. State, 1 Ind. 113; Moreland v. Mayall, 14 Bush. (Ky.) 474; Craddock v. Riddlesbarger, 2 Dana (Ky.), 205; Robbins v. Oldham, 1 Duv. (Ky.) 28; Bryant v. Crosby, 40 Me. 9, 23; Cutler v. Pope, 13 Me. 377; Safford v. Annis, 7 Me. 168; Pruner v. Piercy, 40 Md. 212; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Delany v. Root, 99 Mass. 546; Ross v. Welch, 77 Mass. (11 Gray) 235; Brown v. Sanborn, 21 Minn. 402; Howe v. Batchelder, 49 N. H. 204; Pitkin v. Noyes, 48 N. H. 294, 2 Am. Rep. 218; Kingsley v. Holbrook, 45 N. H. 313; Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81; Bloom v. Welsh, 27 N. J. L. (3 Dutch.) 177; Lacustrian Fertilizing Co. v. Lake Guano Fert. Co., 80 N. Y. 476, 484; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Austin v. Sawyer, 9 Cow. (N. Y.) 39; Green v. Armstrong, 1 Den. (N. Y.) 550, 554; Reeder v. Sayre, 6 Hun (N. Y.), 502; Hartwell v. Bissel, 17 John. (N. Y.) 128; Stewart v. Doughty, 9 John. (N. Y.) 108; Frear v. Hardenbergh, 5 John. (N. Y.) 272, 3 Am. Dec. 356; Newcomb v. Ramer, 2 John. (N. Y.) 421 note [a]; Whipple v. Foote, 2 John. (N. Y.) 418, 3 Am. Dec. 442; Brittain v. McKay, 1 Ired. (N. C.) L. 265; Hershey v. Metzgar, 90 Pa. St. 217; Backenstoss v. Stahler's Admr., 33 Pa. St. 251, 254, 75 Am. Dec. 592; Wilkins v. Vashbinder, 7 Watts. (Pa.) 379; Bellows v. Wells, 37 Vt. 599; Jones v. Flint, 10 Ad. & E. 753, 37 Eng. C. L. 396; Evans v. Roberts, 5 Barn. & C. 829, 11 Eng. C. L. 700; Sainsbury v. Matthews, 4 Mees. & W. 343; Dunne v. Ferguson, 1 Hayes (Ir. Rep.) 540.

¹¹ See Marshall v. Ferguson, 23 Cal. 65-69; Bostwick v. Leach, 3 Day (Conn.), 476; Reed v. Johnson, 14 Ill. 257; Sherry v. Picken, 10 Ind. 375; Craddock v. Riddlesbarger, 2 Dana (Ky.), 204; Parham v. Thompson, 2 J. J. Marsh. (Ky.) 159; Safford v. Annis, 7 Me. (7 Greenl.) 168; Purner v. Piercy, 40 Md. 212; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81; Green v. Armstrong, 1 Den. (N. Y.) 550; Smith v. Tritt, 1 Dev. & B. (N. C.) L. 241, 28 Am. Dec. 965; Brittain v. McKay, 1 Ired. (N. C.) L. 265, 35 Am. Dec. 738; Backenstoss v. Stahler's Admr., 33 Pa. St. 251, 75 Am. Dec. 592; Bear v. Bitzner, 16 Pa. St. 178, 55 Am. Dec. 490; Wilkins v. Vashbinder, 7 Watts. (Pa.) 378; Evans v. Roberts, 5 Barn. & Cres. 829, 11 Eng. C. L. 700; Sainsbury v. Matthews, 4 Mees. & W. 343; Eaton v. Southby, Willes 131; Scorell v. Boxall, 1 You. & J. 396.

2. *Products of a Mixed Nature—Hops.*—There are some products of the earth which partake both of the nature of *fructus industriales* and *fructus naturales*. In such a case the true test has been said to be whether the crop is produced chiefly by the manuriance and industry of man.¹² Thus the fact that a crop is produced from perennial roots is not conclusive evidence that it is to be ranked as *fructus naturales* and as such to pass with the soil. Hop-roots are perennial, and doubtless as much a part of the soil as the forest trees, but the crop of hops grown from these roots depends entirely upon the manuriance and industry of man for its value, and for that reason is classed as *fructus industriales*, and is personal property.¹³

3. *Fructus Naturales.*—The natural products of the soil without man's intervention, such as trees before being felled and converted into timber,¹⁴ and fruit before it is gathered,¹⁵ were at common law regarded as much a part of the soil as the earth from which it sprung.¹⁶ Yet they may in a measure be dealt with and treated by the owner as chattels, the same as *fructus industriales*, and may be sold as such where the intention of the parties contemplates that they shall be severed and removed immediately, or within a reasonable time; but should the sale contemplate their being left to grow or obtain additional strength and increase from the earth, it will be regarded as a sale of an interest in the realty,¹⁷ and for that reason is within the

¹² See Bishop v. Bishop, 11 N. Y. 123.

¹³ Stewart v. Doughty, 9 John. (N. Y.) 108; Graves Weld, 5 Barn. & Ad. 105, 2 Nev. & M. 725, 27 Eng. C. L. 53; Evans v. Roberts, 5 Barn. & Cres. 829, 11 Eng. C. L. 700; Latham v. Atwood, Cro. Car. 515; Anonymous Case, Freem. Ch. 210; Fisher v. Forbes, 9 Vin. Abr. 373, pl. 82; 2 Bl. Com. 122; Co. Litt. 55 a, 55 b.

¹⁴ See United States v. Schuler, 6 McL. C. C. 37.

¹⁵ In Sparrow v. Pond (Minn.), 52 N. W. Rep. 36, in an opinion going over the ancient learning on the subject, it is held that blackberries, while growing on the bushes are not subject to a levy under an execution as personal property. They are not *fructus industriales*, like grain, but are *fructus naturales*, like natural bushes and grasses, and are regarded as a part of the realty.

¹⁶ See Adams v. Smith, Breese (Ill.) 221; Olmstead v. Niles, 7 N. H. 522; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Slocum v. Seymour, 36 M. J. L. (7 Vr.) 138; Bank of Lansingburg v. Crary, 1 Barb. (N. Y.) 542; Green v. Armstrong, 1 Den. (N. Y.) 550, 556; Teal v. Auty, 2 Brod. & B. 99; Crosby v. Wadsworth, 6 East, 602; Rodwell v. Phillips, 9 Mees. & W. 501.

¹⁷ See White v. Foster, 102 Mass. 175; Harrell v. Miller, 35 Miss. 700; Howe v. Batchelder, 49 N. H.

statute of frauds and should be in writing.¹⁸ This rule has been applied in the sale of shrubs and nursery trees,¹⁹ in the sale of growing trees,²⁰ in the sale of grass in the meadow ready to be cut,²¹ and in the sale of an apple and peach crop.²²

4. *Same—Growing Trees.*—Growing trees are regarded as a part of the land from which they spring,²³ and as such are real property.²⁴ Being an interest in land,²⁵ so long as they are not actually or in contemplation of law severed from the soil they are within the statute of frauds and the property in them cannot be transferred by parol;²⁶ but when once they are severed, either in fact or in contemplation of law, they become personal property.²⁷ The sale of growing trees, with

the right at a future time—whether that time is fixed or indefinite—to enter upon the land and cut and remove them conveys an interest in the land;²⁸ but when the intention is to transfer the title of the trees after they shall have been felled or separated from the realty, this is held to be an executory contract for the sale of personal property,²⁹ and vests the title to the trees in the vendee absolutely.³⁰ It has been said that the grant by the owner of the land of all the timber standing and

204; *Kingsley v. Holbrook*, 45 N. H. 313; *Olmstead v. Niles*, 7 N. H. 522; *Slocum v. Seymour*, 36 N. J. L. (7 Vr.) 138; *Vorebeck v. Rowe*, 50 Barb. (N. Y.) 302; *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Pattison's App.*, 61 Pa. St. 204; *Huff v. McCauley*, 53 Pa. St. 276; *Buck v. Pickwell*, 27 Vt. 157; *Lillie v. Dunbar*, 62 Wis. 198; *Daniels v. Bailey*, 43 Wis. 566; *Summers v. Cook*, 28 Grant (Ont.) 391; *McDonnell v. McKay*, 15 Grant (Ont.), 391.

18 *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Green v. Armstrong*, 1 Den. (N. Y.) 550, 556; *Olmstead v. Niles*, 7 N. H. 522; *Jones v. Flint*, 10 Ad. & E. 793, 37 Eng. C. L. 397; *Teal v. Auty*, 2 Brod. & B. 99; *Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 Mees. & W. 501.

19 *See Whitmarsh v. Walker*, 42 Mass. (1 Met.) 313.

20 *Byassee v. Reese*, 4 Met. (Ky.) 372; *Cutler v. Pope*, 13 Me. 377; *Erskin v. Plummer*, 7 Me. (7 Greenl.) 447; *Pruner v. Piercy*, 40 Md. 212; *Nettleton Sikes*, 49 Mass. (8 Met.) 580, 38 Am. Dec. 381; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Killmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun (N. Y.), 792; *Smith v. Bryan*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306.

21 *See Banton v. Shorey*, 77 Me. 48.

22 *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Brown v. Stancilift*, 80 N. Y. 627, 20 Alb. L. J. 55. *See Pruner v. Pierce*, 40 Md. 212, 17 Am. Rep. 591.

23 *Baker v. Lewis*, 33 Pa. St. 301, 75 Am. Dec. 359.

24 *Vorebeck v. Roe*, 50 Barb. (N. Y.) 302; *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Hutchins v. King*, 68 U. S. (1 Wall.) 53, bk. 17, L. ed. 544; *Jones v. Flint*, 10 Ad. & E. 753, 37 Eng. C. L. 397.

25 *Bracket v. Goddard*, 54 Me. 309; *Wright v. Barrett*, 30 Mass. (13 Pick.) 44; *Warren v. Leland*, 2 Barb. (N. Y.) 614.

26 *McGregor v. Brown*, 10 N. Y. 114; *Warren v. Leland*, 2 Barb. (N. Y.) 613. Compare *Claffin v. Carpenter*, 45 Mass. (4 Met.) 580; *Olmstead v. Niles*, 7 N. H. 522; *Smith v. Surman*, 9 Barn. & C. 253. A parol contract conveys no interest in growing timber. *The New Brunswick Land Co. v. Kirk*, 1 Allen (N. B.), 443; *Kennedy v. Robinson*, 2 Cr. & Dlx. 113; *Kerr v. Connel*, Bert. (N. B.) 133; *Murray v. Gilbert*, 1 Hannay (N. B.) 548; *Segee v. Perley*, 1 Kerr (N. B.) 439.

27 *Claffin v. Carpenter*, 45 Mass. (4 Met.) 580; *Smith v. Surman*, 9 Barn. & C. 561, 17 Eng. C. L. 253; *Stuckely v. Butler*, Hob. 173. *See Olmstead v. Niles*,

7 N. H. 522; *Marshall v. Green*, L. R. 1 C. P. Div. 35; *Lifeord's Case*, 11 C. 50.

28 *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 N. H. 313; *Ockington v. Richey*, 41 N. H. 275; *Olmstead v. Niles*, 7 N. H. 522; *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470; *Hendrickson v. Ivins*, 1 N. J. Eq. (1 Saxt.) 562; *Slocum v. Seymour*, 36 N. J. L. (7 Vr.) 138, 13 Am. Rep. 432; *McGregor v. Brown*, 10 N. Y. 114; *Vorebeck v. Roe*, 50 Barb. (N. Y.) 302; *Silvernall v. Cole*, 12 Barb. (N. Y.) 685; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 384; *Warren v. Leland*, 2 Barb. (N. Y.) 614; *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Lawrence v. Smith*, 27 How. Pr. (N. Y.) 327; *Boyce v. Washburn*, 4 Hun (N. Y.), 792; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Harrell v. Miller*, 35 Miss. 700; *Bowers v. Bowers*, 95 Pa. St. 477; *Pattison's App.*, 61 Pa. St. 294; *Huff v. McCauley*, 53 Pa. St. 206; *Yeakle v. Jacob*, 33 Pa. St. 376; *Buck v. Pickwell*, 27 Vt. 157; *Hutchins v. King*, 68 U. S. (1 Wall.) 53, bk. 17, L. ed. 544.

29 *Bostwick v. Leach*, 3 Day (Conn.), 476, 484; *Armstrong v. Lawson*, 73 Ind. 498; *Owen v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Byassee v. Reese*, 4 Met. (Ky.) 372; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Edwards v. Grand Trunk R. Co.*, 54 Me. 105; *Cutler v. Pope*, 13 Me. 377; *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447, 22 Am. Dec. 216; *Purner v. Piercy*, 40 Md. 212; *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *White v. Foster*, 102 Mass. 375; *Delaney v. Root*, 99 Mass. 546; *Drake v. Wells*, 93 Mass. (11 Allen) 141; *Parsons v. Smith*, 87 Mass. (5 Allen) 578; *Giles v. Simons*, 81 Mass. (15 Gray) 441, 77 Am. Dec. 373; *Douglas v. Shumway*, 79 Mass. (13 Gray) 498; *Nettleton v. Sikes*, 49 Mass. (8 Met.) 34; *Claffin v. Carpenter*, 45 Mass. (4 Met.) 530, 38 Am. Dec. 381; *Whitmarsh v. Walker*, 42 Mass. (1 Met.) 313; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Killmore v. Howlett*, 48 N. Y. 569; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306; *Ellison v. Brigham*, 38 Vt. 64; *Marshall v. Green*, L. R. 1 C. P. Div. 35.

30 *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Russell v. Richards*, 11 Me. (2 Fairf.) 371, 26 Am. Dec. 532, 10 Me. (1 Fairf.) 429, 25 Am. Dec. 254; *Drake v. Wells*, 93 Mass. (11 Allen) 141, 143; *Giles v. Simons*, 81 Mass. (15 Gray.) 441, 77 Am. Dec. 373; *McNeal v. Emerson*, 81 Mass. (15 Gray) 384; *Heath v. Randall*, 58 Mass. (4 Cush.) 192; *Nettleton v. Sikes*, 49 Mass. (8 Met.) 34; *Pierrepont v. Barnard*, 6 N. Y. 279, 5 Barb. (N. Y.) 364; 2 Am. Lead. Cas. (4 Am. Ed.) 739, 740, 746, 752; *Smith v. Benson*, 1 Hill (N. Y.), 170; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Barnes v. Barnes*, 6 Vt. 388.

growing thereon to another and his heirs and assigns forever, with permission freely to enter, cut and carry them away at pleasure, conveys an estate of inheritance in the trees, with the right in the soil necessary for their support and growth, while the fee in the soil itself remains in the grantor.³¹

5. *Same—Overhanging Trees.*—Where the trunk of a tree is wholly upon the land of one person, it is a part of his land³² and he is entitled to all its fruit,³³ notwithstanding the fact that some of the branches overhang and some of the roots penetrate the land of an adjacent owner.³⁴ But after the fruit ripens and falls from the branches of the trees onto the land of such adjoining owner, it becomes his property. The adjoining owner, however, cannot be required to submit to this trespass of the tree on his land, but may cut the penetrating roots and lop off the overhanging branches.³⁵

³¹ See *White v. Foster*, 102 Mass. 375; *Delaney v. Root*, 99 Mass. 546; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Knotts v. Hydricks*, 12 Rich. (S. C.) L. 314.

³² *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 203, 11 Am. Rep. 537; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Holder v. Coats*, 1 Moo. & M. 112, 22 Eng. C. L. 264; *Masters v. Pollie*, 2 Rolle, 141. Compare *Waterman v. Soper*, 1 Ld. Raym. 757.

³³ *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; *Master v. Pollie*, 2 Rolle, 141. See *Norris v. Baker*, 3 Bulst. 178; *Miller v. Faudrye*, Poph. 161, 163.

³⁴ *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Dubois v. Beaver*, 25 N. Y. 122, 82 Am. Dec. 326; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645. In *Dubois v. Beaver*, *supra*, Allen, J., says that "different opinions have been held as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other; some holding that in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates. *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 235; 2 Bouv. Inst. 158; while others, with better reason, it seems to me, hold that the tree is wholly the property of him on whose land the trunk stands: *Holder v. Coats*, 1 Moo. & M. 112; *Lyman v. Hale*, 11 Am. Dec. 177, 27 Am. Dec. 728; *Masters v. Pollie*, 2 Rolle, 141; *Crabbe on Real Prop.*, § 96."

³⁵ *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. Rep. 623; *Lyman v. Hale*, 11 Conn. 173, 27 Am. Dec. 728, 731. See *Cope v. Marshall*, 1 Burr. 267; *Welch v. Nash*, 8 East, 394; *Waterman v. Soper*, 1 Ld. Raym. 737; *Masters v. Pollie*, 2 Rolle, 141, 144; *Rex v. Pappineau*, 1 Str. 688; *Crowhurst v. Am. Burial Board*, 39 L. T. N. S. 355. In *Lyman v. Hale*, *supra*, Bissell, J., says: "Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or

6. *Same—"Line Trees."*—When a tree stands upon the boundary line between two adjacent properties, so that a part of the trunk of the tree is on one side and a part on the other side of the line, the tree and its fruit is then the common property of the owners of the adjoining estates, and neither can remove nor injure either without the consent of the other.³⁶ It is said in the case of *Relyea v. Beaver*,³⁷ that whether such trees are common property or not, trespass will lie by one owner against an adjoining owner for cutting such a tree.

7. *Same—Cut Trees.*—Although growing trees are a part of the soil, and pass with it on conveyance, whether upright or prostrate,³⁸ as soon as trees are severed from the root by being cut or blown down they become "timber" or "lumber," according to the use to which the fallen trunk can be applied.³⁹ Where such tree-trunks are allowed to lie upon the ground where they fell they will remain fixtures and pass by a deed of the land;⁴⁰ but where the fallen trunks have been worked up into hewed timbers, posts or round logs, or other materials, and are lying loosely upon the land, though originally intended to be put into a building upon the land, they cease to be fixtures and do not pass by a deed of the realty, nor under the description of appurtenances.⁴¹ JAMES M. KERR.

New York City.

the fruit to his own use: *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Dyson v. Collick*, 5 Barn. & Ad. 600, 7 Eng. C. L. 328, 7 Serg. & Lowb. 205; *Welch v. Nash*, 8 East, 294.

³⁶ *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; *Waterman v. Soper*, 1 Ld. Raym. 737; *Anonymous*, 2 Rolle, 255. See *Adrian v. Lyford*, 9 N. H. 511, 32 Am. Dec. 387.

³⁷ 32 Barb. (N. Y.) 547.

³⁸ *Coxkrill v. Downey*, 4 Kan. 426.

³⁹ See *United States v. Schuler*, 6 McL. C. C. 37.

⁴⁰ *Brackett v. Goddard*, 54 Me. 309.

⁴¹ *Cook v. Whiting*, 16 Ill. 480.

CRIMINAL LAW—HOMICIDE—MISCONDUCT OF PROSECUTOR.

GRAVES V. UNITED STATES.

Supreme Court of the United States, November 6, 1893.

The failure of a person on trial for murder to have his wife in court, in order to afford witnesses an additional means of identifying him—she having been seen with him near the time and place of the murder, is not a proper subject for unfavorable comment in

argument to the jury, the wife being incompetent as a witness for or against her husband. Mr. Justice Brewer, dissenting.

Mr. Justice BROWN: This was a writ of error upon the conviction of the plaintiff in error for the murder of an unknown man in the Indian Territory on the 13th day of February, 1889.

The evidence on the part of the prosecution tended to show that, several days before the murder, two men stopped together at Vian, and obtained a contract to make rails for one Waters, and lived in a house about one mile from Waters' residence. They came from Winslow, in the State of Arkansas, in an old vehicle drawn by two horses, and were on their way to Oklahoma, staying at Vian for a few days for the purpose of earning provisions for themselves and horses. One of these men was accompanied by his wife and two small children. After remaining for several days, they left the neighborhood, and were next seen camping near the scene of the murder, on the evening of February 13th. Their personalities were remembered, although their names were forgotten, except that a boy remembered the name of one of them to have been John Graves. The morning after they were seen together in camp, one of the men was seen putting the horses to the vehicle, in which were the woman and a child, but the witness saw but one man and one child. About the 1st of May following, the remains of a dead man were found near the place where the witness claimed to have seen the people camped. The body was decayed, but was identified mainly by peculiarities of the teeth and clothing. He was the man who had claimed to own the horses and wagon. The witnesses for the prosecution recognized the defendant, Graves, as the other man, though to most of them his name had been unknown. Defendant's wife was admitted to have been in town at the time of the trial, but did not appear in the court room. She was seen by one of the witnesses of the prosecution outside of the court room, and was believed by the witness to have been the woman who had been with the party.

The defense was an alibi, and was supported by several witnesses, who swore that in the months of January, February and March of that year defendant was in Washington County, Ark., a distance of 100 miles or more from the place where the remains of the dead man were found. Upon conviction of murder, defendant sued out this writ of error, making 15 assignments of error.

The first assignment of error is to the action of the court in permitting "the district attorney, in his closing argument to the jury, over the objections of the defendant, to comment upon the absence of the defendant's wife from the presence of the court, and to state, among other things, to the jury, that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that witnesses for the government could see her, and identify her as the woman who was said to have been with the defendant in the Indian

country before the unknown man's remains or bones were found; and other like arguments, statements and declarations." While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made, having no connection with the case, or exaggerated expressions, such as counsel, in the heat of trial, are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially, it is a duty to interfere and put a stop to them, if they are likely to be prejudicial to the accused. *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. Ct. Rep. 765; *Hall v. U. S.*, 150 U. S. —, 14 Sup. Ct. Rep. 22.

Had the wife been a competent witness, the comments upon her absence would have been less objectionable. It was said by Chief Justice Shaw, in the case of *Com. v. Webster*, 5 Cush. 295, 316: "But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances, as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to support the charge." The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 Starkie, Ev. 54; *People v. Hovey*, 92 N. Y. 554, 559; *Mercer v. State*, 17 Tex. App. 452, 467; *Gordon v. People*, 33 N. Y. 508.

But this presumption does not apply to every fact in the case which it may be in the power of the defendant to prove. He is not bound to anticipate every fact which the government may wish to show in the course of the trial, and produce evidence of that fact. In this case the wife was not a competent witness, either in behalf of or against her husband. If he had brought her into court, neither he nor the government could have put her upon the stand; and he was under no obligation to produce her for the purpose assigned by the district attorney—that the witnesses for the government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found. Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused, that he had failed to produce his wife for identification, when, knowing that she could not be a witness, he was under no obligation to do so. The jury would be likely to draw the inference that she was prevented from testifying for her husband because her evidence might be damaging. It was, in fact, as if the court had charged the jury that it was a circum-

stance against him that he had failed to produce his wife in court.

The view we have taken of this assignment of errors renders it unnecessary to consider the others.

The judgment must be reversed, and the case remanded, with instructions to set aside the verdict and grant a new trial.

NOTE.—The very long and exhaustive opinion of Mr. Justice Brewer, in which he dissents from the conclusion of the court in the principal case, shows that there are two sides to the question presented. The dissenting judge thinks that the absence of the defendant's wife from the court room was, under the circumstances, a legitimate subject of comment in argument. After reciting some of the facts which led him to that opinion he says that he does not understand "that a jury in their deliberations are limited to a consideration of that which is, strictly speaking, testimony, but may properly consider any facts developed in the trial from which a reasonable inference may be drawn, for or against either party." *Commonwealth v. Clark*, 14 Gray, 367. In that case there was testimony tending to show that a son of defendant was present and participated in some of the acts relied upon as evidence of guilt. The son was not called as a witness by the defendant and in the argument of the district attorney this fact was commented upon as tending to show his guilt. In respect thereto the Supreme Court observed as follows: "The omission of the defendant to produce his son as a witness to meet and explain the evidence offered by the government in support of the indictment was a proper subject of comment by counsel before the jury and might well be considered by them in connection with the testimony in the case. Witness was in the employment of the defendant and in his interest and could probably have given an explanation of some of the facts tending to show the guilt of the defendant if they were susceptible of any construction favorable to his innocence." In that case as in the principal case there might have been some satisfactory reason for the absence of the witness, but none was given; and it was held and rightly according to Mr. Justice Brewer that his non-production was a subject for consideration and also for comment. See also *Gavignau v. Scott*, 51 Mich. 373; *Tobin v. Shaw*, 45 Me. 331; *Commonwealth v. Webster*, 5 Cush. 295; *McDonough v. O'Neill*, 113 Mass. 92. *State v. Griffin*, 87 Mo. 608, was a case in which the prosecuting attorney commented upon the fact that the defendant's mother, though living only fifteen miles from the court room, was not present at the trial and had evidently abandoned him; and such comments were held by the Supreme Court not sufficient to disturb the judgment. In *State v. Jones*, 77 N. Car. 520, the defendant having had a witness sworn declined to examine him and that fact was commented upon by the prosecuting officer in his closing argument. Objection was made by the defendant but the court declined to interpose and in this it was held by the Supreme Court that there was no error. In *Inman v. State*, 72 Ga. 269, it appeared that a continuance had once been obtained on the ground of the absence of a witness and that when the trial was had the witness was present in court but was not sworn or examined. Objection was made but the court permitted the counsel to proceed and in respect to this the Supreme Court said: "The court held that the conduct of the accused and his counsel during the continuance of the trial were the proper subjects of

comment by the counsel engaged in the case. Counsel are allowed the largest liberty in the argument of cases before juries and whether the argument be logical or illogical or whether the inferences and deductions drawn by them are correct or not, this court will have no power to intervene. Facts not proved cannot be discussed but illogical conclusions from facts proved may be insisted upon and there is no remedy; but in this case we think it was legitimate for counsel to allude to what had transpired in the case from the time it was called through its whole proceeding, and the conduct of the party or his counsel in connection therewith was the proper subject of comment." *People v. White*, 53 Mich. 537, was a case of bastardy, in which counsel commented upon the resemblance between the defendant and the child of the complaining witness, then present in the court room, and in respect to this the Supreme Court said: "We do not well see how the jury could be prevented from noticing the child, which was properly enough in court; and while arguments of resemblance in so young an infant, in the absence of peculiarities, are a little preposterous, it is difficult, on this record, to determine that any rule of law was violated in discussing it."

In the principal case Mr. Justice Brewer thought that while the wife could not be a witness for her husband, yet her presence in the court room—a presence ordinarily to be expected—would most certainly and obviously have aided materially in the identification of the defendant. She was in the city as the testimony showed and her absence from the court room unexplained certainly suggested a motive and that motive one which casts suspicion upon the defendant. The dissenting judge lays down the rule that in the absence of express prohibition every fact which in no illegal manner comes to the knowledge of the jury during the progress of a trial and which may influence their mind is a subject of comment by counsel in their argument. As will be noted, considerable stress is laid in the opinion of the court upon the fact that defendant's wife was not a competent witness and that this distinguishes the case from that cited from 14 Gray, and others in which the books abound. As to this, Mr. Justice Brewer says that while it is true that she could not be sworn and called upon to give testimony, yet she was herself testimony and material testimony and he suggests this illustration: Suppose one of the witnesses for the government in the case had testified that while with the defendant at Vian he had seen in his possession a knife of a peculiar make, had there taken it and made a mark upon it, and the government had proved by some other witness that he had seen in the possession of the defendant on the very morning of the trial a knife of substantially the same make and no knife was produced by the defendant, would not the omission to produce that knife be a significant fact and one which the prosecuting attorney was at liberty to comment upon? If produced and bearing the mark described by the witness it would tend very strongly to support the identification. Just so, if this wife of defendant had been in the court room and these various witnesses for the prosecution had testified that she was the same woman they had seen at Vian, can there be any doubt that the identification would have been more certain? So because in the natural progress of the trial without any misconduct on the part of the prosecution this fact came to the notice of the jury and was a fact which would naturally tend to affect the conclusion of men, it was a fact in respect to which the prosecuting officer was at liberty to comment and suggest to the jury his own conclusions

therefrom. It will be observed that there was nothing denunciatory, harsh or abusive in the language of the district attorney. He simply commented upon the fact obvious to the jury that the wife of the defendant was not in the court room although shown by the defendant's witnesses to be in the city, and drew his conclusions from such facts.

CORRESPONDENCE.

OATHS BY NOTARIES WHO ACT AS ATTORNEY.
To the Editor of the Central Law Journal:

In your issue of Nov. 17th, a number of cases are cited which hold that an attorney cannot, as notary public, take an affidavit in a cause in which he appears as attorney. As no authorities on the other side of the question are there noted it may not be amiss to call attention to a decision of the Supreme Court of Minnesota which expressly holds that affidavits so taken are valid and proper, a rule of the District Court to the contrary notwithstanding, the statute providing that "each notary public" has power "to administer all oaths required or authorized by law to be administered in this State." Young v. Young, 18 Minn. 80.

A. P. BLANCHARD.

Little Falls, Minn. Nov. 23d, 1893.

RECORDING OF DEED—NOTICE.

To the Editor of the Central Law Journal:

On the 21st day of September, 1892, B executed a deed of trust conveying to L, trustee, real and personal property, to secure B S B a debt of \$2,000. This deed was not recorded, and subsequently on the 12th day of April, 1893, B executed a second deed of trust, conveying to C and W, trustees, the same property to secure other debts. This second deed (to C and W), was recorded on the 13th day of April, 1893, and subsequently on the 14th day of April, 1893, the first deed (to L) was recorded. The statute in Virginia, in which the deeds were executed and the property thus conveyed is situated, provides that "every deed of trust conveying real estate on goods and chattels shall be void as to subsequent purchasers for valuable considerations without notice, and creditors, until, and except from the time that it is duly admitted to record." Under the Virginia law, both the *cestui que trust* and the trustees are purchasers for value. C and W, the trustees, in the second deed had notice of the unrecorded deed to L trustee, but the *cestui que trusts* in the second deed had no notice of said deed to L trustee. How are the creditors secured by the second deed affected by C & W's knowledge of the first deeds? Please answer and cite authorities.

Houston, Va.

BENJ. WATKINS LEIGH.

BOOKS RECEIVED.

Lawyers' Reports, Annotated. Book XX. All Current Cases of General Value and Importance Decided in the United States, State and Territorial Courts, with Full Annotation by Burdett A. Rich, Editor, and Henry P. Farnham, Assistant Editor. Aided by the Publishers' Editorial Staff and, Particularly in Selection, by the Reporters and Judges of each Court. (Cited 20 L. R. A.) Rochester, N. Y. The Lawyers' Co-operative Publishing Company, 1893.

A Treatise on the Law of Partnership. By Theophilus Parsons, LL. D. Dane Professor of Law in Harvard University, at Cambridge. Fourth Edition, Revised and Enlarged. By Joseph Henry Beale, Jr., Assistant Professor of Law in Harvard University. Boston: Little, Brown & Company, 1893.

HUMORS OF THE LAW.

Mrs. Motherly—"I presume you have had a good many trials in this life?"

Tough Tramp—"You're shoutin', old lady, and never was acquitted but twice."

Judge—"Have you formed or expressed any opinion as to the guilt or innocence of the accused in this case?"

Man (drawn as juror)—"No, sir. But I have sometimes thought?"

Attorney (rising indignantly)—"Your honor, this man acknowledges that he sometimes thinks. It is hardly necessary to say that we shall challenge him as a juror in this case."

WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMIRALTY—Maritime Liens—State Statutes.—A maritime lien against a vessel for supplies, created by a State statute, will not be enforced by the United States courts unless the supplies were furnished on the credit of the vessel.—S. H. HARMON LUMBER CO. V. LIGHTERS NOS. 27 AND 28, U. S. C. C. of App., 57 Fed. Rep. 664.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed of a portion of a debtor's realty, and a bill of sale of a portion of his personality, to the presidents of certain

banks, taken with a defeasance back, showing that they were given as collateral security for promissory notes to the banks, do not constitute a voluntary assignment for the benefit of creditors with preferences, under the laws of Wisconsin, in that there is no creation of an active trust.—*DUBUQUE NAT. BANK V. WEED*, U. S. C. C. (Wis.), 57 Fed. Rep. 513.

3. **ATTACHMENT—Intervention by Claimant.**—Where a petition of intervention in attachment avers that intervenor is the owner of the goods attached, that he was at the date of the attachment, and now is, their owner, and that he acquired them by purchase from the defendant from time to time; and plaintiff's answer thereto denies "that the said intervenor was, on the day when he filed his petition of intervention, the owner" of the goods, or entitled to their possession,—the burden of proof is on intervenor to show that he owned the goods at the time of filing the petition, and that he had acquired them by purchase.—*LAGOMAR CINO V. QUATTROCHI*, Iowa, 56 N. W. Rep. 435.

4. **ATTACHMENT—Judgment Lien.**—The levy of an attachment on land which the attachment defendant has conveyed to another to defraud his creditors, unless followed by supplemental proceedings, creates no lien.—*BOGGS V. DOUGLASS*, Iowa, 56 N. W. Rep. 412.

5. **ATTORNEY AND CLIENT—Compensation.**—A railroad company employing an attorney to perform services connected with the construction of a connecting line, which it contemplates operating as an extension of its road, is liable for his services, and cannot defeat an action for the recovery of his compensation on the ground that its general officers had no power to bind the corporation for such services.—*ST. LOUIS & S. F. R. CO. V. KIRKPATRICK*, Kan., 34 Pac. Rep. 400.

6. **BOUNDARIES—Adverse Possession.**—Where, in an action to determine the true boundary line between two city lots, which are entirely covered by buildings erected many years ago, the court adopts a crack or seam between the buildings as the true line, the finding will not be disturbed.—*GREER V. POWELL*, Iowa, 56 N. W. Rep. 440.

7. **CARRIERS—Passengers—Contributory Negligence.**—A strong and well-built show car, placed nearest the engine, is not such a place of known danger as will render a passenger on the train, employed by a theatrical company to look after its show property, guilty of contributory negligence as matter of law, in riding on the car in the performance of his duty; and in an action for his death, caused by collision with another train, a finding by the jury that he was not guilty of contributory negligence in so riding will not be disturbed.—*BLAKE V. BURLINGTON, C. R. & N. RY. CO.*, Iowa, 56 N. W. Rep. 405.

8. **CARRIERS—Passenger—Contributory Negligence.**—An adult male passenger, waiting for a railroad train to come to a full stop before attempting to alight, who, when directed and required by the conductor, jumps from the moving train, when it is obvious that he cannot do so with safety, and thereby sustains injuries, cannot recover damages for such injuries.—*WHITLOCK V. COMER*, U. S. C. C. (S. Car.), 57 Fed. Rep. 555.

9. **CARRIERS—Passenger—Extra Fare.**—The rules of a railroad company required passengers without tickets to pay 25 cents extra fare, to be refunded on presentation to a ticket agent of a "rebate check" to be furnished to the passenger by the conductor when he collected the cash fare: Held, that a passenger who, with knowledge of such regulation, enters a train without purchasing a ticket when he has opportunity so to do, cannot recover for his expulsion from the train, without rudeness or violence, for his failure to pay the extra fare.—*SNELLBAKER V. PADUCAH, T. & A. R. CO.*, Ky., 23 S. W. Rep. 509.

10. **CHattel MORTGAGES—Foreclosure.**—Where, on an issue of irregularity and fraud in a foreclosure sale of mortgaged chattels, it appeared that the mortgagee acted as auctioneer and purchased most of the property, that it was not collected together, as is usually

done at a public sale, and that no opportunity was given purchasers to examine it until offered for sale, there was sufficient evidence to be submitted to the jury, and to sustain a finding of the issue in the affirmative.—*SCHIER V. DANKWARDT*, Iowa, 56 N. W. Rep. 429.

11. **CHattel MORTGAGES—Possession of Mortgagees.**—Where a mortgagee takes possession of goods under a chattel mortgage valid as between the parties, the fact that the acknowledgment was defective, and that the record of the mortgage was not constructive notice to third persons, is immaterial, since the taking possession by the chattel mortgagee renders record notice unnecessary.—*LIGGETT & MYERS TOBACCO CO. V. COLLIER*, Iowa, 56 N. W. Rep. 417.

12. **CHINESE—Deportation.**—The words "Chinese laborers," as used in section 6 of the Geary act have the same meaning as in the treaty with China of 1880 in which they are broad enough in their true meaning and intent to include Chinese gamblers and high-binders, since section 2 of the treaty by exclusion provides that no Chinese should be entitled to the benefit of the general provisions of the Burlingame treaty but those who come to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity.—*UNITED STATES V. AH FAWN*, U. S. D. C. (Cal.), 57 Fed. Rep. 591.

13. **CHINESE—Funds for Deportation.**—Congress having appropriated funds for the enforcement of the provisions of the Geary act, a district judge should take judicial cognizance that there are funds for the enforcement of any or all of the sections of such act, and should order the deportation of a Chinaman who has not procured certificates of residence, as required by section 6, although the attorney general has informed such judge "that there are no funds to execute the Geary law, so far as the same provides for the deportation of Chinamen who have not obtained certificates of residence."—*UNITED STATES V. CHUM SHANG YUEN*, U. S. D. C. (Cal.), 57 Fed. Rep. 588.

14. **CHINESE—Warrant for Arrest.**—A warrant for the arrest of a Chinese person under the act of September 13, 1888, will not be refused by a district judge, who has no judicial knowledge that the executive department is without the funds necessary to deport such person under the Geary act of May 6, 1892.—*IN RE LITNER*, U. S. D. C. (Cal.), 57 Fed. Rep. 567.

15. **CONSTITUTIONAL LAW—County Roads.**—Chapter 214, Sess. Laws 1887, providing for the improvement of county roads, is unconstitutional, and therefore cannot have any operation, because in conflict with the provisions of the constitution of the State.—*BOARD OF COM'RS V. ABBOTT*, Kan., 34 Pac. Rep. 416.

16. **CONSTITUTIONAL LAW—Municipal Bonds.**—The legislature of Michigan has no power to authorize a municipality to submit to its electors a proposition to issue bonds in aid of a railroad.—*RISLEY V. VILLAGE OF HOWELL*, U. S. C. C. (Mich.), 57 Fed. Rep. 544.

17. **CONVERSION—Damages.**—In an action for the conversion of personal property, it is proper to award damages sufficient to compensate plaintiff for the loss occasioned by the detention of the property, in addition to the value thereof, when an award of the value, with the interest thereon, is insufficient for the purpose.—*MOORE V. KING*, Tex., 23 S. W. Rep. 484.

18. **CONVERSION—Distress Warrant.**—Where a distress warrant is sued out to enforce a landlord's lien on crops which have been removed from the rented premises by one who has purchased from the tenant, the time within which the warrant can be levied is determined by the issue of the warrant, and plaintiff is not required to file his petition until the appearance day of the next term of the court to which the writ is returnable.—*TAYLOR V. FELDER*, Tex., 23 S. W. Rep. 480.

19. **CORPORATION—Corporate Powers—Lease of Franchise.**—Public or quasi-public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public as well as to

their stockholders; and they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority.—*BRUNSWICK GASLIGHT CO. V. UNITED GAS. FUEL & LIGHT CO., Me.*, 27 Atl. Rep. 525.

20. CORPORATIONS—Executing Notes—Ratification.—Where the power to authorize the execution of notes for a corporation rests in the board of trustees, a note executed by the president and secretary without a resolution of the board is not authorized, though they constitute a majority of the board.—*EDWARDS V. CARSON WATER CO., Nev.*, 34 Pac. Rep. 381.

21. CORPORATIONS—Liability of Stockholders.—The liability of stockholders to the creditors of a corporation is several, and not joint, and, when proceeded against by action, each must be sued separately.—*HOWELL V. FIRST NAT. BANK, Kan.*, 34 Pac. Rep. 395.

22. CORPORATIONS—Stock—Pleading.—In an action by a corporation against a former stockholder to recover money paid him by its president for his stock on an *ultra vires* purchase thereof for plaintiff, the complaint does not state a cause of action if it fails to show that plaintiff has returned or offered to return the stock.—*BANK OF SAN LUIS OBISPO V. WICKERSHAM, Cal.*, 34 Pac. Rep. 444.

23. CORPORATIONS—Stock Assessments.—In an action to recover an assessment on corporate stock, evidence that the assessment was made on the same day that defendant purchased the stock is sufficient to show that it was made while defendant was the owner of the stock, as it will not be presumed that the assessment was made a fraction of a day before the purchase.—*SAN GABRIEL VALLEY LAND & WATER CO. V. DENNIS, Cal.*, 34 Pac. Rep. 441.

24. CORPORATIONS—Stockholders—Dissolution.—Stock in a corporation was issued to B, with the consent of all the stockholders, on his promise to pay a certain sum in making repairs on the plant of the company, and as working capital. He paid only part of the sum, as he had agreed: Held, his stock to the extent of the amount paid was paid for as required by the articles of incorporation, and could be voted by him; and, this amount being sufficient to constitute a majority of the stock, a resolution in favor of which he voted all his shares, including those not paid for, was legally adopted.—*PRICE V. HOLCOMB, Iowa*, 56 N. W. Rep. 407.

25. COUNTY SUPERVISORS—Contracts.—Act March 14, 1893, authorizes the county board of supervisors to issue bonds, and provides that the bond shall be delivered to the county treasurer, by whom they shall be sold to the highest bidder. Section 25 further authorizes the board to do "all other acts and things which may be necessary to the full discharge of the duties of the legislative authority of the county government." Held, that the board did not have authority, under section 25, to employ an agent to procure bids to be made for such bonds.—*SMITH V. LOS ANGELES COUNTY, Cal.*, 34 Pac. Rep. 439.

26. COUNTY WARRANTS—Receipt in Payment of Taxes.—Code 1892, § 318, providing for the registration of county warrants, if the board of supervisors shall so order, and for their payment in the order of their registration, except where there are funds sufficient to pay all warrants, but excepting warrants used in payment of taxes from its provisions, does not repeal Act Feb. 8, 1890, providing that in the county of Bolivar all warrants shall be registered and paid in the order of their issue, unless their be enough funds in the treasury to pay all warrants of prior date, and that the treasurer and tax collector of such county shall only pay or receive such warrants in the order of their issue.—*JONES V. MELCHOR, Miss.*, 13 South. Rep. 837.

27. CREDITORS' BILL—Fraudulent Purchase of Judgment.—The general rule, both at law and in equity, is that the party who would recover back, on the ground of fraud, whatever he has parted with under the contract, must, before bringing suit, offer to return what he has received under the contract, and which he is

able to return.—*PIDCOCK V. SWIFT, N. J.*, 27 Atl. Rep. 470.

28. CRIMINAL EVIDENCE—Homicide.—K & B were jointly charged by information with the crime of manslaughter, and separate trials were demanded. On the trial of B, there was evidence tending to show that K was principal, and B accessory before the fact, in the commission of the offense: Held, that evidence of declarations made by K, in the absence of B, long after the consummation of the alleged criminal acts, was inadmissible.—*STATE V. BOGUE, Kan.*, 34 Pac. Rep. 410.

29. CRIMINAL LAW—Correcting Judgment.—Courts of record have the power, in criminal as well as civil cases, to correct clerical errors appearing in the record of the proceedings of preceding terms of court, so as to make it speak the truth, where other parts of the record and official memorandums clearly show the existence of an error, and what correction should be made.—*IN RE BLACK, Kan.*, 34 Pac. Rep. 414.

30. CRIMINAL LAW—Homicide—Self Defense.—The killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of avoiding the danger, and, if it can be avoided by retreat, the killing is not justified.—*STATE V. JONES, Iowa*, 56 N. W. Rep. 427.

31. CRIMINAL PRACTICE—Felony Assault.—One indicted for felony assault can be convicted of assault and battery.—*CHACON V. TERRITORY, N. Mex.*, 34 Pac. Rep. 448.

32. CRIMINAL PROSECUTION—Information.—A county attorney is not required to file with an information charging violations of the prohibitory liquor law all the statements of witnesses taken before him in a preliminary inquiry pursuant to paragraph 2543, Gen. St. 1889, but only such of them as disclose the fact that an offense has been committed; and the failure to file them will not abate the action, nor furnish ground for quashing the information or discharging the defendant.—*STATE V. KIRKPATRICK, Kan.*, 34 Pac. Rep. 415.

33. DEED—Deputy Clerk—Probate.—Under the provisions of Rev. Code, ch. 37, § 2, allowing the deputy clerk to take the probate of a deed, such probate is valid, though the clerk be the grantee in the deed.—*PILAND V. TAYLOR, N. Car.*, 18 S. E. Rep. 70.

34. DEED—Description.—The words of a grant, "All my right, title, and interest in and to all real estate situated in Hope, Warren, and Union," are sufficient to convey the grantor's estate there situated.—*HOBBS V. PAYSON, Me.*, 27 Atl. Rep. 519.

35. DEED OF TRUST—Preference of Creditors.—A deed of trust for the purpose of preferring certain creditors of the grantor, when acted on by the trustee and beneficiaries, constitute a contract resting on mutual promises, and is therefore supported by a consideration.—*BUTLER V. SANGER, Tex.*, 23 S. W. Rep. 467.

36. DIVORCE—Desertion—Domicile.—A wife who has been deserted by her husband may establish a domicile in a State other than that of her husband's domicile.—*WHITE V. WHITE, R. I.*, 27 Atl. Rep. 506.

37. DOWER—Seisin.—Where there is no seisin in fact or in law by the husband at any time during marriage in a remainder or reversionary interest, his widow is not entitled to dower therein.—*CARTER V. McDANIEL, Ky.*, 23 S. W. Rep. 507.

38. ELECTIONS AND VOTERS—Mandamus.—Mandamus will not issue to compel the rejection of votes cast for a disqualified candidate, though the petition alleges knowledge on the part of the electors of the fact creating the disqualification, when it was averred that they knew that such facts constituted a disqualification, or that, knowing the disqualification, they voted for him in defiance of law.—*GILL V. MAYOR, R. I.*, 27 Atl. Rep. 506.

39. EXECUTION SALE OF PERSONALTY.—The general rule is that the sale of personal property by an officer on execution must be had where the property is situated, or so near that those present at the sale can examine it.—*LAWRY V. ELLIS, Me.*, 27 Atl. Rep. 518.

40. EVIDENCE—Court Records of another State.—A record of proceeding in the judicial district court of the territory of Utah, duly authenticated under the act of congress, is admissible in evidence to show that such proceedings have been had.—*FRIEND V. MILLER*, Kan., 34 Pac. Rep. 397.

41. FACTORS—Advances.—Payment.—A factor, especially under an agreement by which he was to sell under a *del credere* commission, and which also bound him to make advances to a certain per cent. on the goods consigned him, cannot resort to the consignor for such advances before exhausting the property in his hands, and this though the agreement provides that he shall have interest on his advances.—*BALDERSTON V. NATIONAL RUBBER CO.*, R. I., 27 Atl. Rep. 507.

42. FEDERAL COURTS—Jurisdiction—"Inhabitant."—A resident of Kentucky, who is temporarily in Chicago in charge of an exhibit at the World's Columbian Exposition, is an "inhabitant" of Kentucky, and not of Illinois, within the meaning of Act March 3, 1887, ch. 373, § 1 (24 Stat. 552), as corrected by Act Aug. 13, 1888, ch. 866 (25 Stat. 434), which provides that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant.—*BICYCLE STEPLADDER CO. V. GORDON*, U. S. C. C. (Ill.), 57 Fed. Rep. 529.

43. FEDERAL COURTS—Jurisdiction—Suit by Foreign Trustee.—Where, pursuant to 1 Rev. St. Ohio, § 6344, a conveyance in fraud of creditors has been declared void by an Ohio court, and a trustee appointed, to "proceed by due course of law to recover" the property, and administer it for the benefit of creditors, such trustee is vested with the right of property, and may maintain a suit to recover the same in a Federal Court for another State.—*COVER V. CLAFIN*, U. S. C. C. (N. Y.), 57 Fed. Rep. 513.

44. FRAUDULENT CONVEYANCES—Debtor to Creditor.—A creditor may, to protect himself and secure his claim, purchase from a failing debtor his entire stock of merchandise, providing that he acts in good faith, and pays a fair price for the same.—*DAVIS V. MCCARTHY*, Kan., 34 Pac. Rep. 399.

45. GARNISHMENT—Insurance on Exempt Property.—Money due from a policy of fire insurance, taken by a debtor for his own protection, for loss of personal property which is exempt from execution, is not subject to garnishment, even where the creditor has a lien on the property destroyed.—*WARD V. GOGGAN*, Tex., 23 S. W. Rep. 478.

46. GUARDIAN—Clerk—Sureties on Bond.—Code 1880, § 2117, providing that in certain cases the clerk of the Chancery Court shall be appointed as guardian of a minor having property, but that he shall not be required to give bond as such guardian, and his official bond shall cover his liability as such, is not repealed by Act March 9, 1882, § 2, providing that the Chancery Court may require the clerk to give a bond as such guardian; and on the failure to require a bond under the latter provision the Code provision controls.—*FAUST V. MURPHY*, Miss., 13 South. Rep. 862.

47. HABEAS CORPUS—Homicide—Jurisdiction of State Court.—The question whether a State Court has jurisdiction over a pilot indicted for manslaughter, in causing the death of a person on another boat by causing the boat in his charge to collide therewith, cannot be raised an application for a writ of *habeas corpus*, when the prisoner may raise it by appeal or otherwise in the State Courts, and may carry it thence, should the decision be adverse, to the United States Supreme Court by writ of error.—*IN RE WELCH*, U. S. C. C. (N. Y.), 57 Fed. Rep. 576.

48. HOMESTEAD—Abandonment.—Intestate died insolvent, leaving him surviving, three minor children by his first wife, his second wife, and one child by her, part of his land being set aside to the wife and their child for homestead. Shortly after his death his wife left such land, and lived in another county till her death: Held, that the wife had abandoned her homestead, and that her child acquired no homestead right

by the prior occupancy of her mother.—*GAINES V. GAINES*, Tex., 23 S. W. Rep. 465.

49. HOMESTEAD—Mortgage—Foreclosure.—Where a purchaser of land executes his notes for the deferred payments, which expressly retain a vendor's lien, the fact that he uses the premises as a homestead for his family will not invalidate a mortgage executed by him alone to secure other notes given by him in renewal of the vendor's lien notes which he was unable to pay at maturity.—*BAKER V. COLLINS*, Tex., 23 S. W. Rep. 498.

50. HUSBAND AND WIFE—Separate Estate.—R. L. § 2321, provides that a married woman may contract with any person other than her husband, binding herself and separate property as if unmarried; be sued on all contracts made by her without the joinder of her husband, and that execution may be levied upon her separate estate; that she may not, however, become surety for her husband's debts, except by duly executed mortgage: Held, that a married woman may, in conducting a partnership business with her husband, bind herself to third parties for goods furnished the partnership, and such obligation may be enforced against her when sued with him as a partner.—*LANE V. BISHOP*, Vt., 27 Atl. Rep. 499.

51. INJUNCTION—Jurisdiction—Irreparable Injury.—One who has wharves and warehouses on tide lands belong to the State, conceding that this entitles him, under the tide land act, to the exclusive right to purchase, not only the tide land actually covered by the improvement, but also such an additional amount adjoining the same as may be necessary to the use and enjoyment of his buildings, is not entitled to an injunction against erections by another on such adjoining tide land, where he has other means of access to his buildings, as in such case there is no irreparable injury.—*MORSE V. O'CONNELL*, Wash., 34 Pac. Rep. 426.

52. INJUNCTION—Mortgages.—The owner of houses, after they have been removed from his land on to a public street, cannot maintain a suit to enjoin their removal, as he has an adequate remedy at law.—*STOWELL V. WADDINGHAM*, Cal., 34 Pac. Rep. 436.

53. INSURANCE—Application.—McClain's Code, § 1733, which requires insurance companies to attach to the policy any application or representation by the assured affecting its validity, and which prohibits the company from proving any such application or representation not so attached, does not apply to representations appearing on the face of the policy; and the failure to attach the application or representation to the policy will not prevent the company from showing that the insured concealed the fact that the building stood on leased ground, where the policy itself requires any title less than the fee to be expressly stated therein, and provides that the concealment of any fact material to the risk shall void the policy.—*McKINNON V. MUTUAL GUARANTY FIRE INS. CO.*, Iowa, 56 N. W. Rep. 423.

54. INSURANCE—Compromise.—Where an insurance company sends to a bank a draft, payable to the assured, for less than the amount of the policy and loss, with instructions to deliver the same when she shall sign an accompanying receipt in full, claiming to her knowledge that the amount of the draft is the full amount of its liability, and she, knowing the conditions, indorses the draft for collection and deposit, and it is collected by the bank, this amounts to a binding compromise.—*KECK V. HOTEL OWNERS' MUT. FIRE INS. CO.*, Iowa, 56 N. W. Rep. 438.

55. INSURANCE—Proof of Loss.—Failure to furnish proof of loss within 30 days after a fire, in accordance with the provision of an insurance policy providing that persons sustaining loss or damage by fire shall forthwith give notice of such loss, and within 30 days thereafter render a particular and specific account thereof, does not work a forfeiture of the policy but merely delays the date when the loss will become payable.—*KARNWEILER V. PHOENIX INS. CO. OF BROOKLYN*, U. S. C. C. (Kan.), 57 Fed. Rep. 562.

56. INTOXICATING LIQUORS—Effect of Wilson Act.—The Wilson act (26 Stat. 313) puts an imported package

of intoxicating liquors, whether in its original shape or otherwise, under the police power of the State "upon arrival in such State," precisely as other intoxicating liquor in the State is subject to the police power.—*IN RE LANGFORD*, U. S. C. C. (S. Car.), 57 Fed. Rep. 570.

57. INTOXICATING LIQUORS—Questions for Jury.—Beer is presumed to be intoxicating within the meaning of the prohibitory law.—*STATE V. MAY*, Kan., 34 Pac. Rep. 407.

58. INTOXICATING LIQUOR—Verification of Information.—Where a county attorney files an information charging the defendant with keeping a nuisance, and positively verifies the same "as true in substance and in fact," motions to quash the warrant and the information, and a plea in abatement, upon the ground that the information is not properly verified, and that the county attorney has no personal knowledge of the facts alleged therein, are properly overruled.—*STATE V. DUGAN*, Kan., 34 Pac. Rep. 409.

59. JUDGMENT.—A complaint alleged the instrument to defendant of bonds with attached coupons, which defendant had given to plaintiff in payment for land, guarantying the payment thereof, the bringing of suit thereon in another State in plaintiff's name, recovery of judgment, collection thereof by defendant, payment of part to plaintiff, and detention of the balance, for which the complaint asked judgment: Held, that detention might show that part of the coupons belonged to him, and that the remainder of the amount retained was the amount of the expenses of the collection, for which plaintiff had agreed he should be reimbursed; this not being an attack on the judgment.—*TATE V. CONGAR*, Iowa, 56 N. W. Rep. 456.

60. JUDGMENT—Res Judicata.—A judgment at law rendered upon an account stated is conclusive of the fairness of the account, since fraud in obtaining it could have been set up as a defense.—*EDMANDSON V. BEST*, U. S. C. C. of App., 57 Fed. Rep. 531.

61. JUSTICE OF THE PEACE—Jurisdiction—Pleading.—Where a railroad engine scatters fire, thereby injuring timber land, and the owner brings suit for damages before a justice, his petition alleging ownership of the land, the point that the justice has no jurisdiction because the question of title to the land may arise is not raised by demurrer, since the demurrer admits that plaintiff owns the land, and tenders no issue on that question.—*DELZELL V. BURLINGTON, C. R. & N. RY. CO.*, Iowa, 56 N. W. Rep. 433.

62. LANDLORD AND TENANT—Coal Lease—Royalty.—Where the parties to a coal-mining lease stipulating for a specified royalty per ton, "miners' weight," have for years interpreted the term "miners' weight" as meaning a ton of prepared coal, after eliminating therefrom all bone, slate, and material not marketable as coal, it is too late for the lessors to demand an accounting based on the weight of the material as brought out of the mines.—*DRAKE V. LACOE*, Penn., 27 Atl. Rep. 338.

63. LANDLORD AND TENANT—Lease of Water Power.—Where a lease of water power provides for the payment of a fixed sum quarterly unless the supply of water be deficient, when a *pro rata* proportion of the rents is to be forfeited, the amount of rent in case of an insufficient supply is unliquidated, and hence, in such case, interest on the rent, unless expressly stipulated for, cannot be allowed.—*PENGRA V. WHEELER*, Oreg., 34 Pac. Rep. 354.

64. LIMITATIONS—Enforcement of Mechanic's Lien.—The statute in force when plaintiff contracted to construct an irrigating ditch required actions to enforce liens to be brought in 90 days after filing the statement. Plaintiff did not complete the contract or file the statement until after the taking effect of the law of March 12, 1890, which permitted actions within one year after filing statement, and repealed all previous laws, but provided that such repeal should not "affect any right or remedy existing, instituted, or pending under the laws hereby repealed." Held, that the statute of 1890 applied, and plaintiff's action was not barred.—*GAR-*

LAND V. BEAR LAKE & RIVER WATER-WORKS & IRRIGATION CO., Utah, 34 Pac. Rep. 368.

65. LIMITATION OF ACTIONS—Adverse Possession.—Defendant having included a private alleyway over the rear of his lot within the fence which surrounded his lot, and having held it adversely for 10 years, paying taxes and assessments thereon, an adjoining lot owner, who during such time made no claim of right thereto, cannot maintain an action for removal of obstruction therefrom.—*RITTMANN V. ASPELMEIER*, Iowa, 56 N. W. Rep. 421.

66. MASTER AND SERVANT—Employment—Entire Contract.—A contract of employment at a certain amount per week, payable weekly, the employment to continue for a year, is entire and indivisible, so that but one action would lie for breach thereof by discharge of the employee.—*OLMSTEAD V. BACH*, Md., 27 Atl. Rep. 502.

67. MASTER AND SERVANT—Fellow-servants.—A locomotive engineer who is injured by a collision with another train, caused by the negligence of the men in charge of the other train, may recover against the railroad company, as trainmen on different trains are not fellow-servants.—*LOUISVILLE & N. R. CO. V. RAINES*, Ky., 23 S. W. Rep. 505.

68. MASTER AND SERVANT—Negligence.—The mining boss required by the act of 1885, to be employed by mine owners, with prescribed duties relative to the care and inspection of mines, is a fellow-servant with the miners at work in the mine; and, if the owners have exercised reasonable care in the selection of a mining boss, they are not liable for injuries to workmen resulting from his negligence.—*LINEOSKI V. SUSQUEHANNA COAL CO.*, Penn., 27 Atl. Rep. 577.

69. MECHANICS' LIENS—Attorney's Fees.—Code Civil Proc. § 1184, relating to mechanics' liens, requires that "25 per cent. of the whole contract price shall be made payable at least 35 days after the final completion of the contract." Sections 1193, 1195, authorize a claimant, on establishing his lien, to recover costs and an attorney's fee: Held, in an action by a material man to enforce his claim against the 25 per cent. of the contract price retained by the owner, that the costs and attorney's are chargeable against the premises where the sum so retained was not sufficient to satisfy the claim, and the contractor suffered a default, while the owner contested the claim.—*DE CAMP LUMBER CO. V. TOLHURST*, Cal., 34 Pac. Rep. 438.

70. MECHANICS' LIENS—Notice of Claim.—A notice of a lien for materials, stating that the lienor has, by virtue of a contract heretofore made with H and with K, his contractor, furnished materials and done work in plastering a certain dwelling house, the ground on which said dwelling was erected being the property of H, who caused its erection and was its owner or reputed owner, sufficiently complies with Hill's Code, § 3673, providing that the claim filed shall state the name of the person to whom the materials were furnished, such section also making the contractor the agent of the owner.—*ROWLAND V. HARMON*, Oreg., 34 Pac. Rep. 367.

71. MORTGAGE—Subrogation.—Where a mortgage is given on land owned in common by husband and wife to secure a debt of the husband, a purchaser of the husband's interest in the land, who pays off the mortgage debt, is not entitled to be subrogated to the mortgagee's rights as against the wife's interest in the land, since she was only surety for her husband, and was as effectually released by the payment of the debt by the purchaser as if her husband, the principal debtor, had paid it.—*ZELLER V. HENRY*, Penn., 27 Atl. Rep. 559.

72. MUNICIPAL CORPORATION—Amendment of Charter.—1 Gen. St. § 518, provides for the submission of charter amendments to the voter by numbers. City Charter Spokane provides for the submission of amendments by the city council to the electors for adoption: Held, that the fact that amendments voted on were not numbered when the city council concurred therein did not

affect their validity, they having afterwards received from the city clerk numbers by which they were published in the election notices, and referred to on the printed ballots; and it not appearing that the result of the election was altered by the absence of the numbers when the proposed amendments were concurred in by the council. — *PIERCE V. CITY CLERK*, Wash., 34 Pac. Rep. 428.

73. MUNICIPAL CORPORATIONS — Control of Streets—Street Railways. — Under the charter of the City of Trenton giving the city council authority to prescribe the manner in which corporations shall exercise any privilege granted them in the use of any street, or in the digging up of the same, a street railway company will be enjoined from rebuilding its road without the consent of the board of public works of the city which has succeeded to the powers of the council. — *INHABITANTS OF CITY V. TRENTON PASS. RY. CO.*, N. J., 27 Atl. Rep. 483.

74. MUTUAL BENEFIT SOCIETY—Suspension of Officer. — The courts will not interfere to prevent the suspension of an officer of a beneficial order by a superior officer when no property rights are involved, and the rights of appeal from the decision of the superior officer, allowed by the constitution of the order, have not been exhausted. — *MEAD V. STIRLING*, Conn., 27 Atl. Rep. 591.

75. NEGLIGENCE — Dangerous Premises. — Mere permission to pass over dangerous lands, or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner except to refrain from acts willfully injurious. But the owner or occupier of lands who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous. — *PHILLIPS V. LIBRARY CO.*, N. J., 27 Atl. Rep. 478.

76. NEGLIGENCE — Defective Highway. — In an action against a town for the loss of a horse and wagon by reason of the absence of a railing on the side of the highway, there was evidence that the driver stopped his horse about 30 feet east of a row of trees which formed the west boundary of the highway, backed it across the road to the trees, and then between the trees across a sidewalk 11 feet wide, and down a bank into a pond, where the driver and a companion were drowned: Held, that it was error to refuse to instruct the jury that such facts, if proved, would show such negligence on the owner's part as to defeat a recovery. — *LUTTON V. TOWN OF VERNON*, Conn., 27 Atl. Rep. 589.

77. NEGLIGENCE — Deposit of Refuse in Stream. — Where defendant, a coal mining company, placed large quantities of refuse in a stream, which descended upon plaintiff's land and lodged there, plaintiff was entitled to recover damages sustained thereby, though the refuse was deposited in the stream to make room for a retaining wall to prevent the main bulk of the refuse from being washed down on the land of the owners below. — *ELDER V. LYKENS VAL. COAL CO.*, Penn., 27 Atl. Rep. 545.

78. NEGLIGENCE—Obstruction of Stream—Damages. — In an action by a mill owner for damages caused by the construction of a county bridge across the stream in so negligent a manner as to obstruct the flow of the water and set it back on plaintiff's mill, the measure of damages is the difference in value of the mill property before and after the erection of the bridge. — *RIDDLE'S EX'RS V. DELAWARE COUNTY*, Penn., 27 Atl. Rep. 569.

79. NEGLIGENCE — Personal Injuries. — In an action for personal injuries resulting from the attack of defendants' dog on a horse driven by plaintiff, causing him to run away, a petition averring that defendants kept the dog "willfully, unlawfully, and maliciously," with full knowledge of his ferocious and vicious habits, and making no effort to protect the public from his vicious attacks, will justify the award of exemplary damages. — *CAMERON V. BRYAN*, Iowa, 56 N. W. Rep. 484.

80. NEGLIGENCE—Province of Court and Jury. — Since, under the Texas practice, the trial judge is prohibited from invading the province of the jury in weighing the evidence, it is error for him to instruct that a railroad company which permits weeds to grow on its roadbed so as to conceal it from view is guilty of negligence, as matter of law, rendering it liable for injuries to a passenger caused by the collision of the train with a cow, whose immediate approach to the track was concealed from the trainmen by the weeds. — *SAN ANTONIO & A. P. RY. CO. V. LONG*, Tex., 23 S. W. Rep. 499.

81. NEGOTIABLE INSTRUMENTS — Indorser — Protest—Waiver. — A statutory provision that the waiver of demand and notice by an indorser of a promissory note, to be valid, must be in writing, may be waived by the indorser under such facts and circumstances as will estop him from denying that the note was not duly protested for non-payment. — *HALLOWELL NAT. BANK V. MARSTON*, Me., 27 Atl. Rep. 529.

82. NEGOTIABLE INSTRUMENT—Note—Attorney's Fees. — The fact that a note contains a promise to pay, in addition to the named sum for which the note was given, "ten per cent. attorney's fees, if placed in attorney's hands for collection," does not render uncertain the sum due at maturity, so as to affect the negotiability of the note. — *SHEWANDOAH NAT. BANK V. MARSH*, Iowa, 56 N. W. Rep. 458.

83. NEGOTIABLE INSTRUMENTS—Payment—Conversion of Collateral Security. — In an action by a bank on a promissory note, it appeared that defendant delivered as security the promissory note of S, to which was annexed, as collateral security, a certificate of corporate stock in the name of S; that defendant, with the consent of S, agreed that the bank might sell the stock, and take in place of the note of S the note of the purchaser, secured by the same stock reissued in the name of the purchaser; and that the bank sold the stock, and took in payment notes secured by the stock, payable to itself, with which notes defendant had no connection, and over which he had no control: Held that, as the bank had converted the stock to its own use, defendant's note must be credited with the value of the stock at the time of conversion. — *PAULY V. WILSON*, U. S. C. C. (Cal.), 57 Fed. Rep. 548.

84. NEW TRIAL — Time for making. — Though, under Code, § 2838, providing that application for new trial must be made at the term and three days after verdict rendered, except for the cause of newly-discovered evidence, an amendment to a motion for new trial may be filed after the three days specified if it is not a new motion, an amendment to a motion for new trial, alleging failure of the court to instruct touching the burden of proof, the original motion having alleged error in the instructions, is, in legal contemplation, a new motion, and it was error to permit it to be filed after the time specified by section 2838. — *DUTTON V. SEEVERS*, Iowa, 56 N. W. Rep. 398.

85. PARTITION. — Testator devised the residue of his real estate in trust, providing that the trustee should invest "part of such residue and remainder" in certain securities and on several distinct trusts. Some of the beneficiaries, were minors: Held, that partition of the land would be denied, it being in the power of the trustee to sell the same, and invest the proceeds under the will, and a partition being expensive, and not for the best interests of the minors. — *TOMKINS V. MILLER*, N. J., 27 Atl. Rep. 484.

86. PRINCIPAL AND SURETY. — If a surety discharges his obligation for a less sum than its full amount, he can only claim against the principal the actual sum paid. — *PRICE V. HORTON*, Tex., 23 S. W. Rep. 501.

87. PRINCIPAL AND SURETY — Contribution between Sureties. — One of two co sureties on a bond left a legacy to the other, who sold it to B. Thereafter the principal on the bond having defaulted, and the surviving surety refusing to pay any part of the amount of such bond, the executors of the deceased surety paid the whole: Held, that the right to set-off against the legacy

the half of the amount of the bond for which the legatee was liable, and which he refused to pay, was an equity existing even before the payment thereof by the executors, and hence that B took the legacy subject to such right to set-off.—*IN RE BAILEY'S ESTATE*, Penn., 27 Atl. Rep. 560.

88. PUBLIC LANDS—Cancellation of Entry.—Where an entry on public land is allowed at the land office, and payment for the land is received, the entry is *prima facie* valid; and proceedings by the commissioner of the general land office and the secretary of the interior to cancel the entry for misrepresentations of the entryman, without notice to a *bona fide* purchaser from the entryman, are void.—*LEWIS V. SHAW*, U. S. C. C. (Wash.), 57 Fed. Rep. 516.

89. PUBLIC LAND—Homestead Entry.—Where one makes improvements on land entered as a homestead, after being notified that the entry, having been allowed by inadvertence, would be returned to the general land office for cancellation, he cannot claim an allowance for such improvements on final decision against him.—*SMITH V. ARTHUR*, Wash., 34 Pac. Rep. 433.

90. RAILROAD COMPANIES—Contributory Negligence.—In an action for injuries received at a railroad crossing, plaintiff offered testimony that he stopped and listened; and defendant, that the whistle was blown and the bell rung; and the court instructed the jury to decide the issue of fact from the testimony: Held, that the failure of the court to charge that contributory negligence of plaintiff is a matter of defense, which defendant must show by a preponderance of evidence, was not reversible error.—*WHILTON V. RICHMOND & D. R. Co.*, U. S. C. C. (S. Car.), 57 Fed. Rep. 551.

91. RAILROAD COMPANIES—Fires—Negligence.—A railroad company is liable, under Rev. St. ch. 51, § 64, for damage to lumber piled in a permanent lumber yard near its track, caused by fire communicated from its locomotives.—*THATCHER V. MAINE CENT. R. Co.*, Me., 27 Atl. Rep. 519.

92. RAILROAD COMPANY—Highways—Obstructions.—A railroad company cannot be convicted for any obstruction erected or maintained over or upon a highway during the time its business and property were in the hands of a receiver.—*STATE V. MINNEAPOLIS & ST. L. RY. Co.*, Iowa, 56 N. W. Rep. 401.

93. RAILROAD COMPANIES—Injury to Stock.—In an action against a railroad company to recover for a colt alleged to have been killed by defendant at a point where it had a right to fence, but failed to do so, where the only issue presented is whether the colt's death was caused by defendant's train, it is error to charge as to the care to be exercised by defendant in the operation of its trains, when there is some evidence of negligence on its part, since the result might be to confuse the jury as to the question at issue.—*WALL V. DES MOINES & N. W. RY. Co.*, Iowa, 56 N. W. Rep. 436.

94. RAILROAD COMPANIES—Negligence—Fellow-Servants.—The fact that a railroad company connected a spur track to a mill with the main track at one end only, so that it was necessary to use stakes to move a car therefrom to the main track, when it was to be drawn behind the engine, does not show that the company was negligent in constructing its road, so as to make it liable to servants of the mill owner, who owned the engine, injured in moving a car by staking, where they could have had the car drawn in front of the engine, and in such case the engine could have taken it from the spur track.—*WATTS V. HART*, Wash., 34 Pac. Rep. 423.

95. RAILROAD COMPANIES—Right of Way—Damages.—Where a right of way is granted to a railroad company on payment of the "damages" caused to the landowner by the construction of the road, the measure of damages is the difference in the value of the entire property or tract, as a whole, as it was before the railroad was laid upon it, and as it is affected by the railroad

after it is finished and completed.—*HOFFMAN V. BLOOMSBURG & S. R. Co.*, Penn., 27 Atl. Rep. 564.

96. RAILROAD COMPANY—Street Railway Companies—Negligence.—Where an employee was injured while coupling cars, by reason of alleged defects in the coupling apparatus, held that, under the evidence, the question whether he knew of such defects, or was reasonably chargeable with notice thereof was a question for the jury.—*DELUDE V. ST. PAUL CITY RY. Co.*, Minn., 56 N. W. Rep. 461.

97. RECEIVERS—Appointment—Intervention.—Under Code Proc. § 156, providing that any person may before the trial intervene in any action or proceeding who has an interest in the matter in litigation, in the success of either party, or an interest against both, a creditor who has attached certain property of his debtor cannot intervene in opposition to the appointment of a receiver in an action by other creditors against the same debtor.—*STATE V. SUPERIOR COURT*, Wash., 34 Pac. Rep. 430.

98. RECEIVERS—Appointment and Removal.—The statutory provision giving an appeal "from an order appointing or removing or refusing to appoint or remove a receiver" does not allow an appeal from an order removing a receiver for the purpose of appointing another in his place, or from the order appointing such successor.—*STATE V. SUPERIOR COURT*, Wash., 34 Pac. Rep. 431.

99. RECEIVER—Insolvent Corporation—State Court.—If the property of an insolvent foreign corporation has been seized by the sheriff under a warrant of attachment issued by a State court in an action which has afterwards been prosecuted to judgment, and execution issued and levy made upon the property seized, a receiver appointed subsequent to the attachment by the United States Circuit Court of the district in which such property is situated takes the property of the corporation in the jurisdiction subject to such rights over the same as had been acquired by the prior proceedings in the State court.—*COLE V. OIL-WELL SUPPLY Co.*, U. S. C. C. (N. Y.), 57 Fed. Rep. 534.

100. REPLEVIN.—Property held by a defendant in a replevin suit under a redelivery bond is *in custodia legis*, and all parties claiming title derived through a subsequent purchase from him are bound by the final judgment in the case.—*SHERBURNE V. STRAWN*, Kan., 34 Pac. Rep. 405.

101. RES JUDICATA—Adverse Possession.—A decree in plaintiff's favor in a suit to quiet title conclusively settles all questions of title between the parties, whether arising out of adverse possession or otherwise; and hence, in a subsequent action by plaintiff for the possession of the land, defendant cannot set up title by adverse possession, since his possession after the rendition of the decree is not under a claim of right or color of title.—*HINTRAGER V. SMITH*, Iowa, 56 N. W. Rep. 456.

102. SALE—Conditional Sale.—Under an oral contract, the owner of a horse delivered him on condition that the other parties might acquire the title to him by the payment of the price agreed on; but they had not said that they would purchase the horse, and were under no obligations to do so. The owner knew that they desired to exchange the horse for other property: Held, that the transaction was a conditional sale, within the meaning of Code, § 1922, which provides that no sale wherein the transfer of title of personal property is made to depend on any condition shall be valid against a purchaser of the vendee in actual possession, without notice, unless the contract is in writing, acknowledged and recorded.—*WRIGHT V. BERNARD*, Iowa, 56 N. W. Rep. 424.

103. SALE—Failure to Deliver Goods.—In an action for damages for failure to ship goods sold under an alleged agreement with defendant's agent the burden is on plaintiffs to show that the agent had authority to make the alleged contract of sale.—*PRAY V. FARMERS' INCORPORATED CO-OPERATIVE CREAMERY*, Iowa, 56 N. W. Rep. 443.

104. **SALE—Pleading.**—In an action on a note the answer alleged that it was given in payment of a horse purchased by defendants for breeding purposes on plaintiff's representation that he was a sure foal getter, healthy, and first class; that in fact he was not sound, nor a sure foal getter, nor healthy; and that the note was procured by fraud: Held, that the issues made by the answer, the allegations of which were denied by the reply, were failure of consideration, and fraud in the procurement of the notes, and that no question as to a warranty of the horse was presented by the pleadings.—**HUMBERT V. LARSON, Iowa, 56 N. W. Rep. 445.**

105. **SALE—Rescission.**—Where grounds for rescission of a contract exist, and a party desires to avail himself of them, he must act with reasonable promptness in returning the property which he has received under it, and the contract must be rescinded *in toto*, if at all. If there is delay in returning a portion of the property, but it is afterwards restored to, and accepted by, the other party without objection as to time, such delay would not defeat a rescission.—**C. AULTMAN & CO. V. MILLER, Kan., 34 Pac. Rep. 404.**

106. **SALE—Rescission—Misrepresentation as to Solvency.**—The fact that an intending purchaser, though knowing that his liabilities exceed his resources, asserted his ability to pay for the goods, does not constitute such a fraud as will authorize a rescission of the sale after delivery of the goods, when the statement was made under the belief that the larger part of the claims against him were in the hands of persons who would not press them so as to interfere with the conduct of his business.—**WESSELS V. WEISS, Penn., 27 Atl. Rep. 535.**

107. **SALE—Warranty.**—Where, at an auction sale of hogs, the owner makes a public proclamation to the bidders that the hogs were as thrifty a lot as he had ever owned, and he had been in the business many years, it constitutes a warranty of soundness.—**STEVENS V. BRADLEY, Iowa, 56 N. W. Rep. 429.**

108. **SALE—Warranty—Acceptance.**—An ice machine was furnished under a written contract specifying the various parts, and a guaranty to produce 25 tons of ice daily. The buyer operated the same from the 1st of June until September, when he notified the seller that it did not fulfill the contract, and was not accepted, and requested its removal. The seller declined the request claiming that the machine was a full compliance with the contract, and had been accepted in July. Afterwards the purchaser continued to use the machine through the fall and during the entire ice season of the two following years: Held, that this conduct was an acceptance of the machine, and the seller could sue on the contract; the buyer's only remedy being to recoup from the stipulated price—first, any sums required to cure defects in the parts specified in the contract; and, second, the difference in value between a machine of the actual capacity of the one in controversy and a 25-ton machine.—**HERCULES IRON WORKS V. DODSWORTH, U. S. C. C. (Ohio), 87 Fed. Rep. 556.**

109. **SUBROGATION—Rights of Sureties.**—The right of a creditor to retain a pledge or mortgage security for his benefit until the indebtedness secured thereby is paid in full is superior to the equity of a surety who has paid a part only of such debt.—**LONDON & NORTHWEST AMERICAN MORTG. CO. V. FITZGERALD, Minn., 56 N. W. Rep. 464.**

110. **TAXATION—Redemption from Sale.**—Where the purchaser at tax sale receives the amount paid, and delivers the certificate of sale to the landowner's agent for such owner, the redemption is complete, and a deed afterwards issued on such certificate is invalid as against the owner or his mortgagee.—**DOUD V. BLOOD, Iowa, 56 N. W. Rep. 482.**

111. **TRESPASS—Instructions.**—An action may be maintained for a trespass on land though no actual damage has been suffered, since repeated trespasses might be used as evidence of title; and hence the

maxim "*de minimis*" does not apply.—**BRAGG V. LARAWAY, Vt., 27 Atl. Rep. 492.**

112. **WIFE'S POWER TO CONTRACT.**—A married woman may borrow money for the exclusive benefit of any person other than her husband, and bind her separate property for its payment. The knowledge of the lender of her object in borrowing, and of the use intended to be made of the money, will not affect the validity of the transaction. If, however, the relation of debtor and creditor is established between the lender and the third person, the form given to the writings executed touching the loan and the security for the same being a mere device to cover up a real case of suretyship on the part of the married woman, her contract will not be obligatory.—**MCCROFT V. GRANDY, Ga., 18 S. E. Rep. 65.**

113. **WILLS—Declaration to Witnesses.**—It being assumed that M instructed J to prepare her will, and it appearing that, after preparing the will, J entered the room where M was with two persons whom he had asked to be witnesses to the execution of the will, and, in their presence, announced to M that he had brought those persons to witness the will, and thereupon M, understanding the character and contents of the document signed it in presence of the persons so brought in, held, that the requirement of the statute that the will should be declared by the testatrix in the presence of the witnesses was sufficiently complied with.—**HILDRETH V. MARSHALL, N. J., 27 Atl. Rep. 465.**

115. **WILL—Specific Legacies—Set off by trustee against Beneficiary.**—A clause in a will giving to certain persons "all moneys or legacies coming to me from any source" does not create a specific legacy.—**DEAN V. ROUNDS, R. I., 27 Atl. Rep. 515.**

114. **WILLS—Perpetuities.**—In a suit to construe a will, the administrator d b n and all but one of testator's heirs and legatees were plaintiffs, and one heir and the executor and trustee named in the will, who had been removed as executor, were defendants. Testator's brother's wife and five of her minor grandchildren were among the plaintiffs, said minors suing by her as their next friend. On argument plaintiffs were all represented by the same counsel, who contested the validity of the trust created, as did also counsel for the defendant heir. The court, having therefore required the substitution of another next friend for the minors, the chief beneficiaries of said trust, after such substitution, heard reargument: Held, a sufficient rearrangement of the parties to effect a representation of both sides; the principle being that one who sues to construe a will has no right to attack it further than to show his difficulties in executing it, and ask the court's advice about them.—**BELFIELD V. BOOTH, Conn., 27 Atl. Rep. 585.**

116. **WITNESS—Transactions with Decedent.**—Code, § 590, declares that on the trial of an action a party interested shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction with deceased: Held, that plaintiff in an action against an administrator may testify that a contract on which plaintiff relies, and the signature of deceased thereto, are in deceased's handwriting, but not that he saw deceased sign the contract.—**SAWYER V. GRANDY, N. Car., 18 S. E. Rep. 79.**

117. **WITNESS—Transactions with deceased Persons.**—Code § 3639, provides that person interested in the event of an action "shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, against the next of kin, of such deceased person:" Held, that in an action by a bank on a note to which defendant's name was signed by his wife, who also signed it, but who died before the action was commenced, the owner of such bank was not competent to testify to transactions and communications between him and deceased relating to the note.—**CAMPBELL BANKING CO. V. COLE, Iowa, 56 N. W. Rep. 441.**